(23,337)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 762.

GULF, COLORADO & SANTA FE RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

MARY J. McGINNIS, ADMINISTRATRIX OF THE ESTATE W. T. McGINNIS, DECEASED.

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

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a *Caption.*

Be it remembered that at a term of the Court of Civil Appeals of the Third Supreme Judicial District of Texas, begun and holden at the Capital Building in the City of Austin, Texas, on the first Monday of October, A. D. 1911, and ending on the First day of July, A. D. 1912, by adjournment of said court, the following among other proceedings, were had towit:

No. 4986.

GULF, COLORADO & SANTA FE RAILWAY COMPANY, Appellant,
vs.
Mrs. MARY J. MCGINNIS et al., Appellees.

Appeal from District Court, Bell County.

WEDNESDAY, *April 24th*, 1912.

Judgment affirmed.

1 THE STATE OF TEXAS,
County of Bell:

At a term of the Honorable District Court within and for Bell County, Texas, begun and holden at the court house thereof in the City of Belton, on the first Monday in June, A. D. 1911, and which said court is now in session, the Hon. John D. Robinson, Judge of the 27th Judicial District presiding, the following cause came on for trial, towit:

STATE OF TEXAS,
County of Bell:

In the District Court of Bell County, Texas, January Term, A. D. 1911.

No. 7577.

Mrs. MARY J. MCGINNIS
vs.
GULF, COLORADO & SANTA FE RAILWAY COMPANY.

To the Hon. John D. Robinson, Judge of said Court:

Now comes Mary J. McGinnis, Administratrix, who resides in Bell County, Texas, hereinafter called plaintiff, complaining of the Gulf, Colorado & Santa Fe Ry. Co., hereinafter styled defendant: and as cause of action, plaintiff represents to the Court that defendant is a railroad corporation, duly incorporated and organized under the laws of the State of Texas and is and has been for many years past doing business, and has its local office in Belton, Bell County,

Texas, and H. M. Woodruff is its local agent who resides in Bell County.

"A." Plaintiff alleges that she is the surviving wife of W. T. McGinnis, deceased, and that Lyle McGinnis, Lamar McGinnis and Laland McGinnis and Nelta Saunders are the children of plaintiff and the said W. T. McGinnis, deceased, and that said W. T. McGinnis left surviving him no other child or children; that
2 said Laland McGinnis is a minor, a boy, about 19 years of age, and the said Lyle McGinnis is a girl, a minor about 13 years of age, and the said Lamar McGinnis is a minor, a boy about three years of age, all of which children reside with plaintiff in Bell County, Texas; that said Nelta Saunders is the wife of X. B. Saunders, and resides with her husband in Bell County, Texas; that Martha Y. McGinnis is the surviving mother of said W. T. McGinnis, and resides in Sherman, Grayson County, Texas.

The plaintiff brings this suit for the use and benefit of herself and the children above mentioned, and for the said Martha Y. McGinnis.

Plaintiff further alleges that heretofore towit: on or about the 6th day of September, A. D. 1909, defendant was engaged in running and propelling cars for the convenience of passengers and freight over the railroad owned by it, and running through the county of Bell, as aforesaid; that on said day and for a long time prior thereto, the said W. T. McGinnis, deceased, was engaged as a locomotive engineer in the service of defendant, and on or about said day, and in the night time, was performing his usual duties as such engineer on a south bound passenger train, out of Temple, and while engaged in such service, the engine and train upon which he was engaged in work was derailed and caused to leave the track, and on account of the said derailment of said engine and train, the said W. T. McGinnis, deceased, sustained serious injuries, which resulted in his death.

Plaintiff further alleges that at the time and place of said injury, as aforesaid, the defendant negligently and carelessly failed to provide a safe track and road bed for said train to run over, and negligently and carelessly failed to furnish and provide a safe engine and cars and safe machinery in about and upon the train upon which the said W. T. McGinnis was engaged in the performance of his duties; that the defendant carelessly and negligently permitted its said track and switch, located at this point, to be and remain in said
3 dangerous condition, and permitted said switch to be and remain open at said place, and permitted its rails to become out of alignment at said point, and permitted its switch point to become worn away, broken off and defective, and carelessly and negligently permitted the wheels upon the engine, which the said W. T. McGinnis was running to become worn and the flanges on the same to become and remain sharp and in such condition that said train would easily leave the track, and that the same was very dangerous, and negligently permitted the said switch to become loose and unlocked and to remain in such condition, and permitted all the other parts in and about said engine to be and remain in a defective condition, worn and out of repair, and said defendant had carelessly and negligently failed to inspect its track and switch, and its said

engine and the wheels thereof, and had negligently and recklessly failed to discover the state of its said switch and track and engine and had failed to repair and remedy the same, and had failed to provide any warning to the said W. T. McGinnis of the fatally dangerous condition thereof, and on account of said defendant's negligence in the premises said train was derailed and plaintiff was injured as aforesaid.

Plaintiff further alleges that the negligence of the defendant, as aforesaid, was the direct and proximate cause of the derailment of said train, and of said W. T. McGinnis' injuries and of his death.

Plaintiff further alleges that at the time of his death, as aforesaid, which death occurred on or about the 6th day of October, 1909, the said W. T. McGinnis was 51 years of age and in good health and well qualified for the discharge of his business; that he was an experienced locomotive engineer and well qualified for the pursuit of said occupation, and at the time of his death, and for a long time prior thereto, he did thereby earn and receive therefrom the sum of $3000 per annum, and could and would have continued the same during the term of his natural life; that he had since his marriage with his wife, worked for the support of his family, consisting of this plaintiff and their said children, and provided them with all necessities and conveniences of life, and would have educated the children above mentioned in a manner suitable to his station in life; that the said W. T. McGinnis owned no property at the time of his death and was dependent upon his earnings for the support of himself and of his family; that plaintiff and the children of said W. T. McGinnis owned no property, and were before his death entirely dependent upon him for their maintenance and the education of the said children; that the said Martha Y. McGinnis, the mother of said W. T. McGinnis, owns no property and was also dependent on him for her maintenance and support.

Plaintiff further alleges that the said W. T. McGinnis sustained his said injuries without any fault or negligence on his part, and at the time of the derailment of said train he was wholly unaware of the danger and peril which confronted him.

Plaintiff alleges that by reason of the premises, she and her said children and the said Martha Y. McGinnis have sustained actual damages in the sum of Fifty Thousand Dollars.

Wherefore, plaintiff prays the court that they have judgment for the sum of fifty thousand dollars damages; that they be apportioned among the parties entitled thereto, in such shares as the court or jury may find, and for cost of suit and such other and further relief, special and general, in law and equity, as they may show they are entitled to receive.

WINBOURNE PEARCE &
A. L. CURTIS,
Attorneys for Plaintiff.

Filed June 23rd, 1910.
E. E. UPSHAW,
District Clerk, Bell County, Texas.
By TOM S. SAUNDERS, *Deputy.*

5 In the District Court of Bell County, Texas.

No. 7577.

Mrs. MARY J. MCGINNIS et al.
vs.
GULF, COLORADO & SANTA FE RAILWAY COMPANY.

Now comes the defendant, by leave of the court, and files this its first amended original answer, in lieu of the original answer heretofore filed herein, and by way thereof, defendant excepts to said petition and says that same is not good in law, shows no cause of action, and of this it prays judgment of the court.

Defendant specially excepts to said petition for this:

1. Said petition is indefinite in that it is not shown whether the suit in question is maintained under the Act of Congress, concerning the liability of common carriers or whether same is brought under the laws of the State of Texas. This is a material inquiry, because if the suit is brought under the act of Congress, or if deceased was engaged in Interstate Commerce at the time of the accident, then the jurisdiction herein to determine this cause is not in the courts of Texas, but same is exclusive- in the courts of the United States, and if deceased was engaged in Interstate commerce and was hurt while so engaged, the laws of the State of Texas have nothing whatever to do with this cause of action. Plaintiff should allege in her petition facts as to the service in which deceased was engaged at the time of this accident.

JNO. M. FURMAN,
A. H. CULWELL,
Attorneys for Defendant.

By way of plea in abatement, defendant says that this suit is improperly brought and cannot be maintained, and defendant here now denies the right of plaintiffs herein to have or maintain any cause of action growing out of the accident in question. The facts in support of this, defendant's plea in abatement, are apparent of record.

For answer, if required, defendant denies each and singu-
6 lar the allegations contained in plaintiffs' petition, and says same are not true in fact, and of this puts itself upon the country.

For further and special answer, if required, defendant says that plaintiff- ought not to recover for this:

1. The accident occurred at the time and place charged in plaintiff's petition, and same was the result of contributory negligence of the deceased, which contributory negligence is here plead in bar of any recovery.

2. If the accident occurred at the time and place as charged in plaintiffs' petition, same was the result of one of the risks assumed by deceased when he entered the service of the defendant, and such assumed risk on his part is here plead in bar of any recovery.

3. Defendant represents that it, at the time of this accident, was engaged as a common carrier by railroad in commerce between the states of the Union; that the train, of which deceased was the engineer, was handling commerce which had originated beyond the limits of the State of Texas; that said train was a through passenger train and had thereon passengers who had started on trips at points beyond the limits of the State of Texas; that said train was hauling cars which had come from points beyond the limits of the State of Texas in a continuous journey, and said train was handling United States mail, which had originated at points beyond the limits of the State of Texas; that said train was also carrying baggage and express, which had originated at points beyond the limits of the State of Texas; that the passengers above mentioned, the cars, the mail, the baggage and express above set out was being carried in a continuous route from points of origin beyond the limits of the state of Texas, to points of destination within the State of Texas, and that the deceased was employed at the time of the accident, by the defendant in Interstate Commerce; that the defendant company was an interstate carrier and the deceased was employed by it as a locomo-
7 tive engineer, engaged at the time in the handling and carrying of interstate commerce.

These facts are plead in bar of any recovery herein, defendant alleging that plaintiffs have no cause of action under the laws of the state of Texas, and that no relief can be afforded to them by any proper order of this court and on the coming in of the facts as above alleged, defendant asks for its judgment.

4. Defendant represents that under the facts of this case plaintiffs' cause of action, if any they have, which is denied, however, arises solely and alone and same must be determined solely and alone under the laws of the United States, and not by the laws of the State of Texas. Defendant here represents that when the facts are heard, that same will show that this defendant, a common carrier by railroad, was engaged in interstate commerce at the time of the accident out of which this suit arose, and that deceased was an employee of said defendant as a locomotive engineer, running said train, which contained interstate commerce, and these facts are now here plead in bar of any judgment, in favor of the plaintiffs or either of them, and defendant further represents that under this statement of the case, that said plaintiffs nor either of them are entitled to have or maintain this cause of action.

5. Defendant represents that plaintiff ought not to be permitted to recover herein for this, that it had exercised ordinary care to provide deceased with an engine that was reasonably safe for the purpose intended and had exercised a like degree of care to furnish him with a track and road bed that was reasonably safe; that it had caused frequent and careful inspections to be made of the track and switch at the place of accident and had likewise caused frequent and careful inspections to be made of the engine that deceased was using at the time of the derailment; that such inspections which were made by competent employees, had failed to discover any defect in either

the engine or the track and that there were no defects in
8 either of them that could have been ascertained by the exercise of the care required of the defendant and this defendant alleges that the accident, out of which this suit arose, was not the result of any defect in the engine or of any defect in the track, roadbed, switches, cross-overs or any portion of the equipment or appliances; that all of same were in a good condition.

Defendant represents that this accident occurred in the night time; that it was not customary, usual or necessary that inspectors be maintained to inspect railroad tracks during the night time or to have track walkers in the night time and all of these facts were well known to the deceased, who knew that no inspection was made of the track, except in the day time.

Defendant says that the switchlight at the point of the accident showed that the track was in good condition, the switches properly set, but in fact defendant says that the switch at the point of accident had been misplaced so as to wreck a train going in the direction in which this train was going at the time of the derailment. The act in misplacing said switch was the work of designing persons, intent upon mischief; that it was not the result of any negligence on the part of the railway company or of any of its employees; that the condition at the place of wreck was occasioned by the wilful act of a vicious, evil-minded, designing person or persons; that neither this defendant nor any of its officers nor empoyés knew that this switch had been thrown or partially thrown at any time after same occurred until the train was wrecked and that they had no reason to suppose that the switch had been misplaced or in any way tampered with; that this defendant alleges the facts to be that said switch had been tampered with and that too after the hour of 6 p. m. on the night of the accident.

Defendant charging, as it does, the facts to be as above set out, represents that it is not responsible to the plaintiffs for the death of deceased under these circumstances. That these facts con-
9 stitute and are a complete defense to this cause of action, and same are here now plead in bar of any recovery.

Defendant having fully answered, asks to be discharged with its costs.

JNO. M. FURMAN,
A. H. CULWELL,
Attorneys for Defendant,
Gulf, Colorado & Santa Fe Railway Company.

Filed June 27th, 1910.

E. E. UPSHAW,
District Clerk, Bell County, Texas,
By TOM S. SAUNDERS, *Deputy.*

In the District Court of Bell County, Texas, June Term, A. D. 1911.

STATE OF TEXAS,
County of Bell:

To the Hon. John D. Robinson, Judge of said Court:

Now comes Mary J. McGinnis, Administratrix, who resides in Bell County, Texas, hereinafter called plaintiff, leave of the court being first had and obtained and files this her second amended petition in lieu of and as a substitute for her first amended petition filed in this court on June 23rd, 1910, complaining of the Gulf, Colorado & Santa Fe Ry. Co., hereinafter styled defendant; and for cause of action, plaintiff represents to the court that defendant is a railroad corporation, duly incorporated and organized under the laws of the State of Texas, and is and has been for many years past doing business, and has its local office in Belton, Bell County, Texas, and H. M. Woodruff is its local agent, who resides in Bell County.

Plaintiff alleges that she is the duly appointed, qualified and acting administratrix of the estate of W. T. McGinnis, deceased, that she was appointed such administratrix by the county judge of Bell County, Texas, sitting in probate, and that she duly qualified as such and has taken the oath and made the bond required by law, that the court in making its order or appointment aforesaid conferred full power and authority upon her to institute and prosecute this suit. And that letters of administration have been issued to her.

Plaintiff alleges that she is the surviving wife of W. T. McGinnis, deceased, and that Lyle McGinnis, Lamar McGinnis and Laland McGinnis and Nelta Saunders are the children of plaintiff and the said W. T. McGinnis, deceased, and that said W. T. McGinnis left surviving him no other child or children; that said Laland McGinnis is a minor, a boy, about 19 years of age, and the said Lyle McGinnis is a girl, a minor about 13 years of age, and the said Lamar McGinnis is a minor, a boy about three years of age, all of which children reside with plaintiff in Bell County, Texas; that Nelta Saunders is the wife of X. B. Saunders, and resides with her husband in Bell County, Texas;

The plaintiff brings this suit for the use and benefit of herself and the children above mentioned.

Plaintiff further alleges that heretofore, towit: on or about the 6th day of October, A. D. 1909, defendant was engaged in running and propelling cars for the convenience of passengers and freight over the railroad owned by it, and running through the county of Bell as aforesaid; that on said day and for a long time prior thereto the said W. T. McGinnis, deceased, was engaged as a locomotive engineer in the service of defendant, and on or about said day, in the night time, was performing his usual duties as such engineer on a south bound passenger train, out of Temple, and while engaged in such services, the engine and train upon which he was engaged in work, was derailed and caused to leave the track, at and near Silenus, about three miles southeast of Temple in Bell County, Texas, and on

account of the said derailment of said engine and train, the said W. T. McGinnis, deceased, sustained serious injuries, which resulted in his death.

Plaintiff further alleges that at the time and place of said injury, as aforesaid, the defendant negligently and carelessly failed to provide a safe track and road bed for said train to run over, and
11 negligently and carelessly failed to provide and furnish a safe engine and cars and safe machinery in, about and upon the train upon which the said W. T. McGinnis was engaged in the performance of his duties; that the defendant carelessly and negligently permitted its said track and switch, located at this point, to be and remain in said dangerous condition, and permitted said switch to be and remain open at said place, and permitted its rails to become out of alignment at said point, and permitted its switch point to become worn away, broken off and defective, and carelessly and negligently permitted the wheels upon the engine, which the said W. T. McGinnis was running to become worn and the flanges on the same to become and remain sharp and in such condition that said engine would easily leave the track, and that the same was very dangerous, and negligently permitted the said switch to become loose and to remain in such condition, and permitted all the other parts in and about said engine to be and remain in a defective condition, worn and out of repair, and said defendant had carelessly and negligently failed to inspect its track and switch, and its said engine and the wheels thereof, and had negligently and recklessly failed to discover the state of its said switch and track and engine and had failed to repair and remedy the same, and had failed to provide any warning to the said W. T. McGinnis of the fatally dangerous condition thereof, and on account of said defendant's negligence in the premises, said train was derailed and W. T. McGinnis was injured as aforesaid.

Plaintiff further alleges that the negligence of the defendant, as aforesaid, was the direct and proximate cause of the derailment of said train, and of said W. T. McGinnis' injuries and of his death.

Plaintiff further alleges that at the time of his death as aforesaid, which death occurred on or about the 6th day of October, 1909, the said W. T. McGinnis was 51 years of age, and in good
12 health and well qualified for the discharge of his business; that he was an experienced locomotive engineer and well qualified for the pursuit of his occupation, and at the time of his death, and for a long time prior thereto he did thereby earn and receive therefrom the sum of $3000 per annum, and could and would have continued the same during the term of his natural life; that he had since his marriage with his wife worked for the support of his family, consisting of this plaintiff and their said children, and provided them with all necessaries and conveniences of life, and would have educated the children above mentioned in a manner suitable to his station in life; that said W. T. McGinnis owned no property at the time of his death and was dependent upon his earnings for the support of himself and of his family; that plaintiff and the children of said W. T. McGinnis owned no property,

and were before his death entirely dependent on him for their maintenance and the education of the said children;

Plaintiff further alleges that the said W. T. McGinnis sustained his said injuries without any fault or negligence on his part, and at the time of the derailment of said train he was wholly unaware of the danger and peril which confronted him.

Plaintiff alleges that by reason of the premises, she and her said children have sustained actual damages in the sum of Seventy Five Thousand Dollars.

Wherefore, plaintiff prays the court that they have judgment for the sum of Seventy Five Thousand ($75,000) Dollars damages; that they be apportioned among the parties entitled thereto, in such shares, as the court or jury may find and for cost of suit and such other and further relief, special and general, in law and equity as they may show they are entitled to receive.

WINBOURNE &
A. L. CURTIS,
Attorneys for Plaintiffs.

Filed June 5th, 1911.
E. E. UPSHAW,
District Clerk, Bell County, Texas.
By TOM S. SAUNDERS, *Deputy.*

13 In the District Court of Bell County, Texas.

No. 7577.

Mrs. MARY J. McGINNIS et al.
vs.
GULF, COLORADO & SANTA FE RAILWAY COMPANY.

Now comes the defendant, and, leave of the court first obtained, files this, its second amended original answer, in lieu of its first amended original answer heretofore filed, and by way thereof excepts to plaintiff's third amended petition and says same is not good in law, shows no cause of action and of this *is* prays judgment.

I.

Defendant specially excepts to said petition and says that plaintiffs are not entitled to recover in the way and manner that the suit is filed and that they are not entitled to judgment herein, nor any relief under and by reason of said petition.

II.

Defendant specially excepts to the third paragraph of said petition, beginning with the line: "Plaintiff alleges that she is the surviving wife of W. T. McGinnis, deceased," because same is wholly immaterial and such allegations have no place in this suit.

III.

Defendant specially excepts to those allegations relative to the support rendered by deceased to his family, as well as to the allegations to the effect that he had no property, and likewise to the allegations that plaintiff and the children had no property, because each and all of said allegations are immaterial; they present no issue of fact or law, could not be made the basis of recovery and are wholly irrelevant, and on each and all of the above exceptions defendant prays judgment.

For answer defendant denies each and singular the allegations in said petition contained, says same are not true in fact and of this puts itself upon the country.

For special answer, if required, defendant says that plaintiff ought not to recover for this:

14 1. That if the accident occurred at the time and place charged in plaintiff's petition, that same was the result of one of the risks assumed by the deceased as a locomotive engineer and such assumption of risk is here plead in bar of any recovery.

2. Defendant represents that it, at the time of this accident, was engaged as a common carrier by railroad in commerce between the States of the Union; that the train of which deceased was the engineer, was handling commerce which had originated beyond the limits of the State of Texas; that said train was a through passenger train and had thereon passengers who had started on trips at points beyond the limits of the State of Texas; that said train was hauling cars which had come from points beyond the limits of the State of Texas in a continuous journey, and said train was handling United States mail which had originated at points beyond the limits of the State of Texas, that said train was also carrying baggage and express which had originated at points beyond the limits of the State of Texas; that the passengers above mentioned, the cars, the mail the baggage and express above set out was being carried in a continuous route from points of origin beyond the limits of the State of Texas, to points of destination within the State of Texas, and that the deceased was employed at the time of the accident, by the defendant in interstate commerce; that the defendant company was an interstate carrier and the deceased was employed by it as a locomotive engineer, engaged at the time in the handling and carrying of interstate commerce.

These facts are plead in bar of any recovery herein, defendant alleging that plaintiffs have no cause of action under the laws of the State of Texas, and that no relief can be afforded to them by any proper order of this court and on the coming of the facts as above alleged, defendant asks for its judgment.

3. Defendant represents that under the facts of this case, plaintiffs' cause of action, if any they have, which is denied, however,

15 arises solely and alone and same must be determined solely and alone by and under the laws of the United States, and not by the laws of the State of Texas. Defendant here represents that when the facts are heard, that same will show that this defend-

ant, a common carrier by railroad, was engaged in interstate commerce at the time of the accident out of which this suit arose, and that deceased was an employee of said defendant as a locomotive engineer, running said train, which contained interstate traffic and cars, and said deceased was therefore engaged in interstate commerce, and these facts are now plead in bar of any judgment in favor of the plaintiffs or either of them, and defendant further represents that under this statement of the case, that said plaintiffs nor either of them are entitled to have or to maintain this cause of action.

4. Defendant represents that plaintiff ought not to be permitted to recover herein, for this, that it had exercised ordinary care to provide deceased with an engine that was reasonably safe for the purpose intended and had exercised a like degree of care to furnish him with a track and roadbed that was reasonably safe; that it had caused frequent and careful inspections to be made of the track and switch at the place of accident and had likewise caused frequent and careful inspections to be made of the engine that deceased was using at the time of the derailment; that such inspections which were made by competent employés, had failed to discover any defect in either the engine or the track, and that there were no defects in either of them that could have been ascertained by the exercise of the care required of the defendant and this defendant alleges that the accident, out of which this suit arose, was not the result of any defect in the track, roadbed, switches, cross-overs or any portion of the equipment or appliances; that all of same were in good condition.

Defendant represents that this accident occurred in the night time; that it was not customary, usual or necessary that in-
16 spectors be maintained to inspect railroad tracks during the night time or to have track walkers in the night time and all of these facts were well known to the deceased, who knew that no inspection was made of the track, except in the day time.

Defendant says that the switch light at the point of the accident showed that the track was in good condition, the switches properly set, but in fact defendant says that the switch at the point of the accident had been misplaced so as to wreck a train going in the direction in which this train was going at the time of the derailment. The act in misplacing said switch was the work of designing persons, intent upon mischief; that it was not the result of any negligence on the part of said railway company or any of its employés; that the condition at the time of wreck was occasioned by the wilful act of a vicious, evil-minded, designing person or persons; that neither this defendant nor any of its officers or employees knew that this switch had been thrown or *or* partially thrown at any time after same occurred until the train was wrecked, and that they had no reason to suppose that the switch had been misplaced or in any manner tampered with; that this defendant alleges the facts to be that said switch had been tampered with and that too after the hour of 6 p. m. on the night of the accident.

Defendant, charging as it does, the facts to be as above set out, represents that it is not responsible to the plaintiffs for the death of deceased under these circumstances. That these facts constitute and

are a complete defense to this cause of action, and same are here now plead in bar of any recovery.

Defendant having fully answered, asks to be dismissed with its costs.

JNO. M. FURMAN,
A. H. CULWELL,
Attorneys for Defendant Gulf, Colorado & Santa Fe Railway Company.

Filed June 5th, 1911.

E. E. UPSHAW,
District Clerk, Bell County, Texas,
By TOM S. SAUNDERS, *Deputy.*

17 In the District Court of Bell County, Texas, June —, A. D. 1911.

No. 7577.

MARY J. MCGINNIS
vs.
G., C. & S. F. RY. CO.

GENTLEMEN OF THE JURY:

The plaintiff, Mrs. Mary J. McGinnis, brings this suit as administratrix of the estate of W. T. McGinnis, deceased, and she alleges that she has been duly appointed by the county court of Bell County and has qualified as such administratrix as required by law.

She alleges that as such administratrix she brings this suit for the benefit of herself as the surviving wife of W. T. McGinnis and for the benefit of the children of herself and W. T. McGinnis, deceased, towit: Laland McGinnis, a boy nineteen years old; and Lyle McGinnis, a girl thirteen years old; and Lamar McGinnis, a boy about three years old; and Nelta Saunders, wife of X. B. Saunders.

Plaintiff alleges that the death of the said W. T. McGinnis occurred at Silenus about three miles southeast of Temple, in Bell County, Texas, on or about the 6th day of October, 1909, and was caused by the negligence of the defendant company in that it carelessly failed to provide a safe track and roadbed for the train which W. T. McGinnis was then upon as an engineer in the service of defendant, to run over, and negligently and carelessly permitted its said track and switch located at Silenus to be and remain open at said place, and permitted its switch point to become worn away, broken off, and defective and negligently permitted its said switch to become loose and to remain in such condition, and negligently and carelessly failed to inspect its track and switch, and had negligently failed to discover the condition of its said switch and track, and had failed to repair and remedy the same, and had failed to provide any warning to the said W. T. McGinnis of the dangerous condition thereof, and that on account of said negligence the said

train was derailed and that W. T. McGinnis sustained in-
18 juries which resulted in his death.

Plaintiff alleges that the negligence complained of was the direct and proximate cause of the death of W. T. McGinnis, and that by reason thereof those for whose benefit she brings this suit have sustained injuries in the sum of seventy five thousand ($75,000) dollars, and for which she prays judgment.

The defendant answers by various pleas, and answers by denying each and singular the allegations in plaintiff's petition contained, and says that the same are not true in fact, and of this it puts itself upon the country.

And further the defendant specially answers:

(1) That if the accident occurred at the time and place charged in plaintiff's petition, that same was the result of one of the risks assumed by the deceased as a locomotive engineer;

(2) That defendant at the time of this accident was engaged in interstate commerce as a common carrier, that the deceased was an engineer on a train that was engaged in interstate commerce and contained cars, passengers, baggage, mail and express which had originated at points beyond the limits of the State of Texas, and that the rights of the parties hereto are determined solely and alone by act of Congress, and that plaintiff is not entitled to predicate liability or maintain this action under any law or laws of the State of Texas.

(3) That defendant had exercised ordinary care to provide deceased with an engine that was reasonably safe for the purpose intended, and had exercised a like degree of care to furnish him with a track and roadbed that was reasonably safe, and that it had caused frequent and careful inspections to be made of the track and switch at the place of accident, and had likewise caused frequent and careful inspections to be made of the engine that deceased was using at the time of the derailment; that such inspections had been made by competent employees who had failed to discover any defect in either the engine or the track, and that there was no defects in either
19 of them that could have been ascertained by the exercise of the care required of the defendant, and that the accident out of which this suit arises was not the result of any defect in the track, roadbed, switches, cross-overs, or any portion of the equipment or appliances, that all of same were in good condition.

Defendant further avers that some person intent upon mischief wantonly and wilfully interfered with and disarranged the switch and track and misplaced the switch so as to wreck a train goin- in the direction in which this train was going at the time of derailment, and alleges that said switch had been tampered with as aforesaid after the hour of six o'clock p. m. on the night of the accident, and that the defendant company had no reason to suppose that the switch had been misplaced or in any way tampered with, and that neither it nor any of its officers or employees knew that this switch had been thrown or partially thrown at any time after same occurred until the train was wrecked.

I give you in charge the following as the law applicable to this case.

(1) Negligence is defined to be the want of ordinary care; that is, the want of such care as an ordinarily prudent person would have exercised under the same or similar circumstances.

(2) By proximate cause is meant an efficient cause without which the injury would not have happened and from which danger or injury might reasonably have been anticipated as a natural and probable consequence.

(3) An employee of a railroad company is held in law to assume such risks as are ordinarily incident to the service he engages to perform, and such others as he knows of or must necessarily have known of in the ordinary discharge of the duties of his service; but risks arising from the negligence of the company's servants or employees that are chargeable to it are not assumed by an employee, unless he knows of them or must necessarily have known of them in the ordinary discharge of the duties of his service.

(4) It is the duty of a railroad company to exercise ordinary care in the construction of its roadbed and switches, and to exercise ordinary care in inspecting and maintaining the same in a reasonably safe condition for the operation of its trains and if it fails to do so and injury thereby results, the same would be negligence for which it would be liable.

(5) Ordinary care is such care as an ordinarily prudent person would have exercised under the same or similar circumstances.

(6) Now if you believe from the evidence that the plaintiff Mrs Mary J. McGinnis, is the duly qualified administratrix of the estate of W. T. McGinnis, deceased, and was the wife of W. T. McGinnis at the date of his death, and that Lyle McGinnis, Laland McGinnis and Lamar McGinnis were their minor children, and that Nelta Saunders was their married daughter, and if you further believe from the evidence that on or about the 6th day of October, 1909 in Bell County, Texas, the said W. T. McGinnis was in the employment of the defendant as a railway engineer, and as such was engaged in running one of the defendant's locomotives in the operation of one of the defendant's passenger trains, and that while so employed running said passenger train over its line of railway he ran his engine and train into a defective switch at Silenus, thereby causing the accident in question, and which resulted in the death of W. T. McGinnis; and if you further believe from the evidence that the switch point at said place had worn away, broken off and became defective, or if you find from the evidence that said switch point had become loose or open; and if you further find from the evidence that the defendant had failed to inspect its said switch and road bed, and had failed to warn W. T. McGinnis of the dangerous condition thereof (if it was dangerous and defective at the place in question at the time above specified) and if you further find that the defendant was negligent in permitting its switch to be and remain in
21 such defective condition (if you find it was in a defective condition) and if you further find that it failed to exercise ordinary care to inspect said switch and track, and if you find that such failure if any, was negligence as that term has been heretofore defined, and if you further find that such negligence, if any, was

the direct and proximate cause of the death of W. T. McGinnis, then you will find for the plaintiff and assess the damages as hereinafter directed unless you should find for the defendant under other instructions given you in this charge.

(7) The burden is upon the plaintiff to prove by a preponderance of the evidence all of the facts necessary to make out a case for her recovery as submitted by the court in the next preceding paragraph of this charge, and unless such facts are so established you must find for the defendant.

(8) If you find that W. T. McGinnis was killed as alleged, but that the same was the result of risks ordinarily incident to his employment and such was assumed by him in undertaking and continuing in the employment as such engineer, you will find for the defendant and so say by your verdict.

(9) If you believe from the evidence that the switch at Silenus was displaced or injured in any manner by explosion or otherwise by some person intent upon mischief, and that the same caused the accident that resulted in the death of W. T. McGinnis, and that defendant was not negligent in failing to discover the same, then you will find for the defendant.

(10) If you find for the plaintiff, then you will return a verdict in her favor as administratrix for such sum of money as damages as if paid in hand in cash at this time would be sufficient to fairly and justly compensate the persons for whose benefit this suit is brought for such pecuniary benefits as you may believe from the evidence they had a reasonable expectation of receiving from W. T. McGinnis, if any, from and after the date of the death of W. T. McGinnis, if his death had not been so occasioned.

(11) If you find for the plaintiff, the form of your verdict
22 will be "We the jury, find for Mrs. Mary J. McGinnis, Administratrix, the sum of — Dollars as damages and we apportion the same as follows": You will then in your verdict apportion such amount between any or all of the persons for whose benefit this suit has been brought, stating in your verdict how much, if anything, you find for each of said persons.

If you find for the defendant *tou* will simply so say by your verdict.

You, the jury, are the exclusive judges of the credibility of the witnesses, of the facts proved, and of the weight to be given the testimony, but you are bound to receive the law from the court which is herein given you and be governed thereby.

JOHN D. ROBINSON,
Judge of the 27th Judicial District.

Filed June 7th, 1911.
E. E. UPSHAW,
Clerk District Court, Bell County, Texas.

We the jury find for Mrs. Mary J. McGinnis, Administratrix, the sum of Fifteen Thousand $15,000 dollars as damages, and we apportion the same as follows: To Mrs. Mary J. McGinnis, Seven thousand and five hundred $7,500 dollars, Seven Thousand Five

Hundred $7,500 dollars to be equally divided among the four children.

JOE B. FERGUSON,
Foreman.

In the District Court of Bell County, Texas.

No. 7577.

MARY J. McGINNIS et al.
vs.
GULF, COLORADO & SANTA FE RY. CO.

The defendant requests the court to charge the jury as follows: The jury are charged to return a verdict for the defendant.

TERRY, CAVIN & MILLS,
A. H. CULLWELL,
JOHN M. FURMAN,
Attorneys for the Defendant.

23 Refused.
JOHN D. ROBINSON,
Judge 27th Judicial District.

Filed June 7th, 1911.
E. E. UPSHAW,
District Clerk, Bell County, Texas.

In the District Court of Bell County, Texas.

No. 7577.

MARY J. McGINNIS et al.
vs.
GULF, COLORADO & SANTA FE RAILWAY COMPANY.

The jury is charged that if you believe that the accident was occasioned by the malicious interference with the switch stand by some evilly disposed person in the night time of the night on which the accident occurred, then your verdict should be for the defendant, unless you further find that the defendant knew of such interference or knew such facts in regard thereto as would put a person of ordinary prudence on inquiry.

J. M. FURMAN,
A. H. CULWELL,
Attorneys for the Defendant.

Refused.
JOHN D. ROBINSON,
District Judge.

Filed June 7th, 1911.
E. E. UPSHAW,
District Clerk, Bell County, Texas.

In the District Court of Bell County, Texas.

No. 7577.

MARY J. McGINNIS et al.
vs.
GULF, COLORADO & SANTA FE RAILWAY COMPANY.

The defendant requests the court to charge the jury as follows:

The law does not define "ordinary care" further than that the same must be such care as a man of ordinary prudence would exercise under the same or similar circumstances. What would be ordinary care in one case might be gross negligence in another. And the care required of a railway company in inspecting and caring for a switch located in a curve on a down grade, at a point
24 where such switch materially increased the hazard and danger of running a train, might be found by the jury to be much higher than in a case where a switch is a permanent part of the roadbed, and is located on a straight road and at grade. The true question for the jury in determining the degree of care required in the matter under consideration is, did the defendant exercise the same care in maintaining its switches at the point of the accident that a person of ordinary prudence and care would have exercised under the same or similar circumstances.

If you find that the defendant did exercise such care, then even though the death of engineer McGinnis was due to the accident, still the plaintiff is not entitled to recover, and if you so find, you will find for the defendant.

TERRY, CAVIN & MILLS,
A. H. CULWELL,
JOHN M. FURMAN,
Attorneys for the Defendant.

Refused.
JOHN D. ROBINSON,
Judge 27th Judicial Dist.

Filed June 7th, 1911.
E. E. UPSHAW,
District Clerk, Bell County, Texas.

Dist. Court.

McGINNIS
vs.
SANTA FE.

If you believe that the deceased knew that it was not usual nor customary to have the switch stands, switches and track inspected under normal circumstances, in the night time, then you are charged

that deceased assumed all of the risk growing out of such failure to so inspect, and plaintiff cannot recover because of the failure of the railroad company to so inspect.

JNO. M. FURMAN,
A. H. CULWELL,
For Def't.

Given to be considered by you in connection with the main charge.
JOHN D. ROBINSON,
Dist. Judge.

Filed June 7th, 1911.
E. E. UPSHAW,
Clerk District Court, Bell County, Texas.

25 Dist. Court.

McGINNIS
vs.
SANTA FE.

You are charged that if you find from the evidence that it was not usual nor customary to inspect the switches or track in the night time and that there was no circumstance to the defendant in the exercise of ordinary care to indicate that the switch and track at place of accident should have been inspected in the night time, then the defendant would not be guilty of negligence for its failure to so inspect.

JNO. M. FURMAN,
A. H. CULWELL,
For Def't.

We request the above charge to be given also.
A. L. CURTIS &
WINBOURN PEARCE,
Att'ys for Plaintiff.

Given:
JOHN D. ROBINSON.

Filed June 7th, 1911.
E. E. UPSHAW,
District Clerk, Bell County, Texas.

In the District Court of Bell County, Texas.

No. 7577.

MARY J. McGINNIS
vs.
GULF, COLORADO & SANTA FE RAILWAY COMPANY.

The defendant asks the court to charge the jury as follows:
You are charged that you will disregard all the allegations in

plaintiff's petition setting up negligence on the part of the defendant in having allowed its flanges on the wheels of its engine to become sharp, and in allowing its switch to remain unlocked, and in allowing its rails to remain out of alignment, and allowing its engines and cars to be defective; which allegations you will disregard in considering this case, as there has been no evidence introduced bearing on any of such allegations.

TERRY, CAVIN & MILLS,
A. H. CULWELL,
JOHN M. FURMAN,
Attorneys for Defendant.

26 Given to be considered by the jury in *consideration* with the main charge.

JOHN D. ROBINSON,
Dist. Judge.

Filed June 7th, 1911.

E. E. UPSHAW,
Clerk District Court, Bell County, Texas.

In the District Court of Bell County, Texas.

No. 7577.

MARY J. McGINNIS et al.
vs.
GULF, COLORADO & SANTA FE RY. CO.

The defendant requests the court to charge the jury as follows:
You are charged that the employee assumes all the risks ordinarily incident to the business in which he is engaged, and if you find that the death of W. T. McGinnis was caused by one of the risks ordinarily incident in the running *or* locomotive engines, and was not the result of any want of ordinary care on the part of the defendant in providing and maintaining reasonably safe tracks and switches for the running of its trains, then if you so find, you will find for the defendant.

TERRY, CAVIN & MILLS,
A. H. CULWELL,
JOHN M. FURMAN,
Attorneys for Defendant.

Given to be considered by you in connection with the main charge.

JOHN D. ROBINSON,
Dist. Judge.

Filed June 7th, 1911.

E. E. UPSHAW,
District Clerk, Bell County, Texas.

In the District Court of Bell County, Texas.

No. 7577.

MARY J. MCGINNIS et al.
vs.
GULF, COLORADO & SANTA FE RY. CO.

The defendant asks the court to give the following special charge to the jury:

27 You are charged that the railway company is in no case an insurer of the safety of its employés, and if you find from the evidence that at the point of the accident the defendant company provided and maintained reasonably safe tracks and switches for the purpose of conducting its business in operating its freight and passenger trains, and that the accident was solely the result of an injury to the switch caused by some evil-minded person, and not through any want of ordinary care on the part of defendant, then if you so find, you will find for the defendant.

TERRY, CAVIN & MILLS,
A. H. CULWELL,
JOHN M. FURMAN,
Attorneys for the Defendant.

Given to be considered by the jury in connection with the main charge.

JOHN D. ROBINSON,
Dist. Judge.

Filed June 7th, 1911.
E. E. UPSHAW,
Clerk District Court, Bell County, Texas.

In District Court, Bell County, June Term, 1911.

No. 7577.

MARY J. MCGINNIS et al.
vs.
G., C. & F. RY. CO.

Special Charge No. 9.

The defendant requests the court to charge the jury:

Should you find for the plaintiff you should limit the amount you may assess as damages to such sum as if paid in cash, in hand at this time, would fairly and justly compensate plaintiff for the pecuniary loss you may find from the evidence (if any) that she has sustained as the direct and proximate result of the death of W. T. McGinnis, her husband.

And you cannot and must not consider as a basis for damages, or

as any item therein, any loss of companionship, or mental
28 anguish, or grief or suffering, she may have been occasioned by his said death.

TERRY, CAVIN & MILLS,
A. H. CULWELL,
JOHN M. FURMAN,
Att'ys for Def'd't.

Given to be considered by the jury in connection with the main charge.

JOHN D. ROBINSON,
Dist. Judge.

Filed June 7th, 1911.

E. E. UPSHAW,
Clerk District Court, Bell County, Texas.

In District Court of Bell Co., June Term, 1911.

No. 7577.

MARY J. MCGINNIS et al.
vs.
GULF, COLORADO & SANTA FE RY. CO.

Special Charge No. 10.

You are charged that you cannot find any damages in favor of Nelta Saunders alleged to be a daughter of W. T. McGinnis, because the proof shows that she is a married woman and is supported by her husband X. B. Sanders, and there is no proof that she had any expectation of any pecuniary assistance from her said father, W. T. McGinnis, nor is there any allegation in the petition that she has any expectation of such assistance if her father had lived.

TERRY, CAVIN & MILLS,
A. H. CULWELL,
JNO. M. FURMAN,
Att'ys for Def'd't.

Refused.

JOHN D. ROBINSON,
Dist. Judge.

Filed June 7th, 1911.

E. E. UPSHAW,
District Clerk, Bell County, Texas.

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No. 7577.

MARY J. McGINNIS
vs.
GULF, COLORADO & SANTA FE RAILWAY COMPANY.

JUNE 5TH, 1911.

This day this cause was called for trial and both parties announced ready, then came on to be heard the general and special exceptions of the defendant, which were by the court overruled, except No. 3 thereof, which was sustained, to which ruling of the court the defendant then and there excepted, and a jury, to-wit, Joe B. Ferguson, and eleven others were duly selected, empaneled and sworn, who having heard the pleadings read, the evidence submitted, the argument of counsel in support thereof, and being duly charged by the court, retired to consider their verdict, and afterwards on the 8th day of June returned into court the following verdict, which was received by the court and is here now entered upon the minutes as follows:

"We the jury find for Mrs. Mary J. McGinnis, administratrix, the sum of Fifteen Thousand ($15,000) dollars as damages and we apportion the same as follows: "To Mrs. Mary J. McGinnis Seven Thousand and five hundred $7500.00 dollars, Seven Thousand five hundred $7500.00 dollars to be equally divided among the four children.

JOE B. FERGUSON, *Foreman.*"

It is therefore ordered, adjudged and decreed by the court that the plaintiff do have and recover of and from the defendant the sum of Fifteen Thousand $15,000.00 Dollars; that Seven thousand five hundred $7500.00 dollars of said amount be recovered for the use and benefit of Mrs. Mary J. McGinnis, and that the remaining Seven Thousand Five Hundred ($7500.00) Dollars be recovered for the use and benefit of the four children mentioned in plaintiff's petition filed herein, towit, the sum of Eighteen Hundred — ($1875) dollars for the use and benefit of each of said four children.

It is further ordered that the defendant pay all costs of this suit, and that this judgment bear interest from date thereof at the rate of six per cent per annum; for all of which execution may issue.

30 District Court, Bell Co., June Term, 1011.

No. 7577.

Mrs. MARY J. McGINNIS et al.
vs.
THE GULF, COLORADO & SANTA FE RY. CO.

Now comes the defendant and prays that the court set aside the verdict rendered in above cause on the 8th day of June, 1911 and grant defendant a new trial:

1. Because the verdict of the jury is contrary to the law.
2. Because the verdict of the jury is contrary to the evidence.

TERRY, CAVIN & MILLS,
A. H. CULWELL,
JNO. M. FURMAN,
Att'ys for Def'd't.

Filed June 7th, 1911.
E. E. UPSHAW,
District Clerk, Bell County, Texas.

In the District Court of Bell County.

No. 7577.

Mrs. MARY J. MCGINNIS et al.
vs.
GULF, COLORADO & SANTA FE RAILWAY COMPANY.

Now comes the defendant, leave of the court first had, and files this its amended motion for a new trial in lieu of original motion therefor filed herein June 9th, 1911, and for grounds thereof, defendant represents that the court erred herein as follows:

I.

The court erred in overruling defendant's general demurrer to plaintiff's second amended petition.

II.

The court erred in overruling defendant's first special exception to said petition.

III.

The court erred in overruling defendant's second special exception to said petition.

IV.

The court erred in overruling defendant's third special exception to said petition.

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V.

The court erred in failing and refusing to give defendant's first, second, third and tenth special charges, and in refusing to give each of them.

VI.

The court erred in stating in its charge to the jury the amount of recovery sought by the plaintiffs.

VII.

The court erred in giving the following paragraphs of its charge to the jury, towit: third, fourth, fifth, sixth, seventh, eighth, ninth, tenth and eleventh, and in giving each or either of said paragraphs.

VIII.

The court's charge is contradictory in this, that the issues as submitted in the main charge are contradictory to the issues as set up in special charges numbers four (4) and five (5) which were given by the court at the request of the defendant, and the jury was doubtless misled by the contradictory issues thus submitted, and the contrary statements as to the law as so given to them in charge. This tended to confuse the jury and left them no criterion as to the responsibility of the defendant company herein.

IX.

In no event should a verdict have been returned in favor of Nelta Saunders. The evidence showed that she was a married woman who was supported by her husband and there was no evidence showing or tending to show that she received any contributions from her father, or that she would likely receive such contributions in the future. Judgment, therefore, awarding her damages was without evidence to sustain it, and same should be set aside.

X.

The verdict of the jury is contrary to the law and not supported by the evidence herein for this, that there is an entire failure in the evidence to show any such negligence on the part of the defendant as would warrant recovery herein. There is no evidence to
32 indicate that the defendant had failed to discharge any duty that it owed to the deceased, or that the accident was the result of any negligence chargeable to the defendant, and for these reasons the verdict of the jury is against the manifest weight and great preponderance of the evidence.

XI.

The verdict ought to be set aside and a new trial granted because the plaintiff failed to show, and the evidence does not show, what was the cause of the accident in question.

XII.

The verdict of the jury is contrary to the law and not supported by the evidence herein for this, that while the plaintiff charged that the track at point of accident was out of repair and that the switch points at the place where the train left the track were defective, and that by reason of such defective switch points the derailment occurred, yet there is a total failure in the evidence to show such defective condition of the switch points as could have caused the accident. The evidence wholly fails to show that the condition of the switch points had anything whatever to do with the derailment of the train. The evidence shows, without controversy, that if the switch was cocked or partly open, that the train would have been derailed, without regard to the condition of the switch points. In other words, there is no evidence which even remotely shows that the

condition of the switch points was the proximate cause of the accident or that same even contributed to the accident, and in all of these respects the verdict of the jury is against the manifest weight and great preponderance of the evidence.

XIII.

The verdict of the jury is contrary to the law and not supported by the evidence herein for this, that the evidence shows without dispute that the lug which held the pitman rod, connected with the switchstand, had been forcibly removed; that aside from the fact that the lug was removed, the switch stand, pitman rod,
33 bridle rod and all other portions of the switch stand were in good condition and safe for use; that because the lug, as above described, had been removed, the pitman rod had been disconnected from the switch-stand, which permitted the switch to be partly open, and that because the switch was partly open, the train was wrecked; that no force applied to the switch or switch points could have removed the lug and that no train in passing over the track could have done the damage that was done, towit, the forcible removal of the lug, and that the condition of the track and switch had nothing whatever to do with the derailment of the train. and in all of these respects the verdict of the jury is against the manifest weight and great preponderance of the evidence.

XIV.

The verdict of the jury is contrary to the law and not supported by the evidence for this, that the evidence shows that regular inspections of the switches and tracks were made by the defendant that trains going in the same direction as the one which was derailed passed safely over the tract after five p. m. of October 5th, 1909, that this accident did not occur until about two a. m. of October 6th, 1909, that the track, switches and switch-stand *was* in good condition and proper for use for the passage of trains at the time the last train going south passed over the same, that during the night time of the night on which the accident occurred, the lug which prevented the pitman rod from being removed and disconnected from the switch stand was by a great force torn off and the pitman rod disconnected, that this was unknown to the defendant, and that it was not in possession of any information which made it necessary to a reasonably prudent person that the switch stand should have been inspected just prior to the passage of passenger train No. 17 over the same; that the switch had been tampered with by some evilly disposed person in the night time, and for each and all of these reasons the verdict of the jury is against the manifest weight and great preponderance of the testimony.

34 XV.

The evidence shows without conflict that it was not usual or customary under normal conditions to inspect the track, switches and stands in the night time; that the conditions at the time of this wreck

were normal; that the switch in question was located on straight track, on level ground, in a clear country; that there had been no rainfall for some time previous to the accident which made it necessary or proper to keep track walkers doing service in the night time; that there were no unusual circumstances in being, which rendered it expedient for the defendant to have the switches and switch stand inspected in the night time; that it was well known and well understood by all operatives of trains, including the deceased, that under normal conditions, the track, switches and switch points were not and would not be inspected in the night time; that the deceased knew on the night in question, or it is fair to assume that he knew that the switch and switchstand at the point in question had not been inspected later than six o'clock on the afternoon before; under this state of the evidence the deceased clearly assumed all risks growing out of the failure to inspect the track, switches and switch stand during that night. It was one of the ordinary risks of the service, well known by all engineers, and for each and all of these reasons the verdict of the jury is against the manifest weight and great preponderance of the testimony.

XVI.

The evidence clearly indicates that the switch stand at the point in question had been tampered with during the night of the accident by some evilly disposed person, and that but for such tampering of said switch, the train would not have been derailed. There are no circumstances in evidence which put the defendant company upon notice that this switch stand was likely to be tampered with or that it ought to be inspected during the night. The conclusion is irresistible that the switch was in good condition prior to dark of the afternoon before, and for each and all of these reasons the
35 verdict of the jury is against the manifest weight and great preponderance of the testimony.

XVII.

The evidence shows that the switch stand in question was a standard switch stand; that there was none better known to practical railroad men; that the track at that point was laid with 85 pounds steel, the road bed was ballasted and that all parts of the track, switches and switch stand were perfectly safe for the passage of trains and of this train; that the sole cause of derailment was the fact that the switch was partly open and that it could not have been open without either throwing the switch lever or forcibly removing the pitman rod from its connection with the switch stand. The evidence shows that the lever was in proper condition and the switch locked, but that the lug had been by force removed, which permitted someone to disconnect the pitman rod from the switch stand, and that when it was disconnected, the switch points were opened sufficiently to derail the train; that this occurred in the night time by an evilly disposed person and under circumstances that could not have been anticipated by the defendant railway com-

pany, and for all of these reasons the verdict of the jury is against the manifest weight and great preponderance of the testimony.

Wherefore, defendant asks that a new trial be granted herein.

JNO. M. FURMAN,
A. H. CULWELL,
Attorneys for Defendant, Gulf, Colorado & Santa Fe Railway Company.

Filed June 14th, 1911.
E. E. UPSHAW,
Clerk District Court, Bell County, Texas.
By TOM S. SAUNDERS, *Deputy.*

36

JUNE 29TH, 1911.

7577.

MARY J. MCGINNIS
vs.
G., C. & S. F. RY. CO.

This day came on to be heard the motion and amended motion of the defendant herein, to set aside the verdict and judgment, rendered and entered against it on a former day of this term of court and grant a new trial of this cause, which said motions being duly considered and fully understood by the court were in all things overruled, to which ruling of the court the defendant by its counsel excepts, and in open court gave notice of appeal to the court of Civil Appeals for the Third Supreme Judicial District of the State of Texas, and that thirty days from this date are allowed in which to file statement of facts and bills of exception in this case.

District Court, Bell County.

No. 7577.

MARY J. MCGINNIS, LYLE MCGINNIS, LAMAR MCGINNIS, LALAND MCGINNIS, NELTA SAUNDERS and MARTHA Y. MCGINNIS
vs.
GULF, COLORADO & SANTA FE RAILWAY COMPANY.

Whereas, in the above numbered and entitled cause, pending in the district court of Bell County, State of Texas, and at a regular term of said court, towit, on the 8th day of June, A. D. 1911, the said Mrs. Mary J. McGinnis, Lyle McGinnis, Lamar McGinnis, Laland McGinnis and Nelta Saunders, wife of X. B. Saunders, recovered judgment against the Gulf, Colorado & Santa Fe Railway Company for the sum of Fifteen Thousand Dollars ($15,000.00) to be divided between them as follows: To Mrs. Mary J. McGinnis, Seven Thousand Five Hundred Dollars ($7,500.00) to Lyle McGinnis, Laland McGinnis, Lamar McGinnis, minors and Nelta Saunders, wife of X. B. Saunders, Seven Thousand Five Hundred

Dollars ($7,500.00) with interest thereon from the 8th day of June, 1911 at the rate of six per cent per annum, and all costs of suit, from which judgment the said Gulf, Colorado & Santa Fe Railway Company has taken an appeal to our Court of Civil Appeals for the Third (3) Supreme Judicial District of the
37 State of Texas, and desires to suspend the execution of said Judgment during the pendency of said appeal;

Now, therefore, we, the said Gulf, Colorado & Santa Fe Railway Company as principal, and the other subscribers hereto as sureties, acknowledge ourselves bound to pay to the said Mrs. Mary J. McGinnis, Lyle McGinnis, Lamar McGinnis, Laland McGinnis and Nelta Saunders, wife of X. B. Saunders, the sum of Forty Thousand and No/100 ($40,000.00) Dollars, conditioned that the said Gulf, Colorado & Santa Fe Railway Company shall prosecute its appeal with effect, and in case the judgment of the Supreme Court or the Court of Civil Appeals shall be against it, that it shall perform its sentence, judgment or decree and pay all such damages as said court may award against it, the said Gulf, Colorado & Santa Fe Railway Company.

Witness our hands this 15th day of July, 1911.

By TERRY, CAVIN & MILLS,
Its Solicitors.

H. O. STEIN.
GEO. SEALY.

Approved July 17th, 1911.
E. E. UPSHAW,
Clerk Dist. Court, Bell County.

Filed July 17th, 1911.
E. E. UPSHAW,
Clerk Dist. Court, Bell County.

In the District Court of Bell County.

No. 7577.

MARY J. MCGINNIS et al.
vs.
GULF, COLORADO & SANTA FE RAILWAY COMPANY.

Now comes the defendant and files the following as its assignments of error herein:

First Assignment of Error.

The court erred in overruling and failing to sustain defendant's general demurrer to plaintiff's second amended original petition.

Second Assignment of Error.

The court erred in overruling and failing to sustain de-
38 fendant's first special exception to plaintiff's second amended petition.

Third Assignment of Error.

The court erred in overruling and failing to sustain defendant's second special exception to plaintiff's second amended petition.

Fourth Assignment of Error.

The court erred in giving the sixth paragraph of its charge to the jury, which was as follows:

"Now, if you believe from the evidence that the plaintiff Mrs. Mary J. McGinnis, is the duly qualified administratrix of the estate of W. T. McGinnis, deceased, and was the wife of W. T. McGinnis at the date of his death, and that Lyle McGinnis, Laland McGinnis and Lamar McGinnis were their minor children, and that Nelta Saunders was their married daughter, and if you further believe from the evidence that on or about the 6th day of October, 1909, in Bell County, Texas, the said W. T. McGinnis was in the employment of the defendant as a railway engineer, and as such was engaged in running one of the defendant's locomotives in the operation of one of defendant's passenger trains, and that while so employed in running said passenger train over its line of railway he ran his engine and train into a defective switch at Silenus, thereby causing the accident in question, and which resulted in the death of W. T. McGinnis; and if you further believe from the evidence that the switch point at said place had worn away, broken off and became defective; or if you find from the evidence that said switch had become loose or open; and if you further find from the evidence that the defendant had failed to inspect its said switch and road-bed and had failed to warn W. T. McGinnis of the dangerous condition thereof (if it was dangerous and defective at the place in question at the time above specified) and if you further find that the defenedant was negligent in permitting its switch to be and remain in such defective condition (if you find it was in a defective condition) and if you further find that it failed to exercise ordi-
39 nary care to inspect said switch and track, and if you find that such failure, if any, was negligence as that term has been heretofore defined, and if you further find that such negligence, if any, was the direct and proximate cause of the death of W. T. McGinnis, then you will find for the plaintiff and assess the damages as hereinafter directed unless you should find for the defendant under other instructions given you in this charge."

Fifth Assignment of Error.

The court erred in giving the ninth paragraph of its charge to the jury which was as follows:

"If you believe from the evidence that the switch at Silenus was displaced or injured in any manner by explosion or otherwise by some person intent upon mischief, and that the same caused the accident that resulted in the death of W. T. McGinnis, and that defendant was not negligent in failing to discover the same, then you will find for the defendant."

Sixth Assignment of Error.

The court erred in giving the tenth paragraph of its charge to the jury, which was as follows:

"If you find for the plaintiff, then you will return a verdict in her favor as administratrix for such sum of money as damages as if paid in hand in cash at this time would be sufficient to fairly and justly compensate the persons for whose benefit this suit is brought for such pecuniary benefits as you may believe from the evidence *that* had a reasonable expectation of receiving from W. T. McGinnis, if any, from and after the date of the death of W. T. McGinnis if his death had not been so occasioned."

Seventh Assignment of Error.

The court erred in giving the eleventh paragraph of its charge to the jury, which was as follows:

"If you find for the plaintiff the form of your verdict will be, "We, the jury, find for Mrs. Mary J. McGinnis, Administratrix the sum of — dollars as damages and we apportion the same as
40 follows": You will then in your verdict apportion such amount between any or all of the persons for whose benefit this suit has been brought, stating in your verdict how much, if anything, you find for each of said persons."

Eighth Assignment of Error.

The court erred in failing and refusing to give special charge No. 1, asked by defendant, which was as follows: The defendant asks the court to charge the jury as follows: "The jury are charged to return a verdict for the defendant."

Ninth Assignment of Error.

The court erred in failing and refusing to give special charge No. 2, requested by the defendant, which was as follows:

"The jury is charged that if you believe that the accident was occasioned by the malicious interference with the switch stand by some evilly disposed person in the night time of the night on which the accident occurred, then your verdict should be for the defendant, unless you further find that the defendant knew of such interference or knew such facts in regard thereto as would put a person of ordinary prudence on inquiry."

Tenth Assignment of Error.

The court erred in failing and refusing to give special charge No. 3, asked by the defendant, which was as follows: "The defendant requests the court to charge the jury as follows:

"The law does not define 'ordinary care' further than that the same must be such care as a man of ordinary prudence would exercise under the same or similar circumstances. What would be ordinary care in one case might be gross negligence in another. And the care required of a railway company in inspecting and caring for

a switch located in a curve on a down grade, at a point where such switch materially increased the hazard and danger of running a train, might be found by the jury to be much higher than in a case where a switch is a permanent part of the roadbed and is located on a straight road and at grade. The true question for the jury
41 in determining the degree of care required in the matter under consideration is, did the defendant exercise the same care in maintaining its switches at the point of the accident that a person of ordinary prudence and care would have exercised under the same or similar circumstances.

"If you find that the defendant did exercise such care, then even though the death of engineer McGinnis was due to the accident, still the plaintiff is not entitled to recover and if you so find, you will find for defendant."

Eleventh Assignment of Error.

The court erred in failing and refusing to give special charge No. 10, to the jury, which was as follows:

"You are charged that you cannot find any damages in favor of Nelta Saunders, alleged to be a daughter of W. T. McGinnis, because the proof shows that she is a married woman and is supported by her husband X. B. Saunders, and there is no proof that she had any expectation of any pecuniary assistance from her said father W. T. McGinnis, nor is there any allegation in the petition that she had any expectation of such assistance if her father had lived."

Twelfth Assignment of Error.

The court erred in failing and refusing to set aside the verdict returned herein, and in failing to give the defendant a new trial on the eighth ground of its amended motion therefor, which was as follows:

"The court's charge is contradictory in this, that the issues as submitted in the main charge are contradictory to the issues as set up in special charges four (4) and five (5) which were given by the court at the request of the defendant, and the jury was doubtless misled by the contradictory issues thus submitted, and the contrary statements as to the law as so given to them in charge. This tended to confuse the jury and left them no criterion as to the responsibility of the defendant company herein."

42 Thirteenth Assignment of Error.

The court erred in failing and refusing to set aside the verdict returned herein, and in failing to give the defendant a new trial on the ninth ground of its amended motion therefor, which was as follows:

"In no event should a verdict have been returned in favor of Nelta Saunders. The evidence showed that she was a married woman, who was supported by her husband, and there was no evidence showing or tending to show that she received any contributions from her father, or that she would likely receive such contribu-

tions in the future. Judgment, therefore, awarding her damages was without evidence to sustain it, and same should be set aside."

Fourteenth Assignment of Error.

The court erred in failing and refusing to set aside the verdict returned herein, and in failing to give the defendant a new trial on the tenth ground of its amended motion therefor, which was as follows:

The verdict of the jury is contrary to the law and not supported by the evidence herein for this, that there is an entire failure in the evidence to show any such negligence on the part of the defendant as would warrant a recovery herein. There is no evidence to indicate that the defendant had failed to discharge any duty that it owed to the deceased, or that the accident was the result of any negligence chargeable to the defendant, and for these reasons, the verdict of the jury is against the manifest weight and great preponderance of the evidence."

Fifteenth Assignment of Error.

The court erred in failing and refusing to set aside the verdict returned herein, and in failing to give the defendant a new trial on the eleventh ground of its amended motion therefor, which was as follows: "The verdict ought to be set aside and a new trial granted because the plaintiff failed to show, and the evidence does
43 not show, what was the cause of the accident in question."

Sixteenth Assignment of Error.

The court erred in failing and refusing to set aside the verdict returned herein, and in failing to give the defendant a new trial on the twelfth ground of its amended motion therefor, which was as follows:

"The verdict of the jury is contrary to the law and not supported by the evidence herein for this, that while the plaintiff charged that the track at point of accident was out of repair and that the switch points at the place where the train left the track were defective, and that by reason of such defective switch-points the derailment occurred, yet there is a total failure in the evidence to show such defective condition of the switch points as could have caused the accident. The evidence wholly fails to show that the condition of the switch points had anything whatever to do with the derailment of the train. The evidence shows, without controversy, that if the switch was cocked or partly open, that the train would have been derailed without regard to the condition of the switch points. In other words, there is no evidence which even remotely shows that the condition of the switch points was the proximate cause of the accident, or that same even contributed to the accident, and in all of these respects the verdict of the jury is against the manifest weight and great preponderance of the evidence."

Seventeenth Assignment of Error.

The court erred in failing and refusing to set aside the verdict returned herein, and in failing to give the defendant a new trial on the thirteenth ground of its amended motion therefor, which was as follows:

"The verdict of the jury is contrary to the law and not supported by the evidence herein for this, that the evidence shows, without dispute, that the lug which held the pitman rod, connected with the switch stand, had been forcibly removed, that aside from the fact that the lug was removed, the switch stand, pitman rod,
44 bridle rod and all other portions of the switch stand were in good condition and safe for use; that because the lug, as above described, had been removed, the pitman rod had been disconnected from the switch stand, which permitted the switch to be partly open, and that because the switch was partly open, the train was wrecked; that no force applied to the switch or switch points could have removed the lug, and that no train in passing over the track could have done the damage that was done, towit, the forcible removal of the lug, and that the condition of the track and switch had nothing whatever to do with the derailment of the train, and in all of these respects the verdict of the jury is against the manifest weight and great preponderance of the evidence."

Eighteenth Assignment of Error.

The court erred in failing and refusing to set aside the verdict returned herein, and in failing to give the defendant a new trial on the fourteenth ground of its amended motion therefor, which was as follows:

"The verdict of the jury is contrary to the law and not supported by the evidence herein, for this, that the evidence shows that regular inspections of the switches and tracks were made by the defendant, that trains going in the same direction as the one which was derailed passed safely over this track after five p. m. of October 5th, 1909, that this accident did not occur until about two p. m. of October 6th, 1909, that the track, switches and switch stand was in good condition and proper for use for the passage of trains at the time the last train going south passed over the same; that during the night time of the night on which the accident occurred, the lug which prevented the pitman rod from being removed and disconnected from the switch stand, was by a great force torn off and the pitman rod disconnected, that this was unknown to the defendant and that it was not in possession of any information which made it necessary to a reasonably prudent person that the switch stand should have been inspected just prior to the passage of passenger train
45 No. 17 over the same; that the switch had been tampered with by some evilly disposed person in the night time, and for each and all of these reasons the verdict of the jury is against the manifest weight and great preponderance of the testimony."

Ninteenth Assignment of Error.

The court erred in failing and refusing to set aside the verdict returned herein, and in failing to give the defendant a new trial on the fifteenth ground of its amended motion therefor which was as follows:

The evidence shows without conflict that it was not usual or customary under normal conditions to inspect the track, switches and switch stands in the night time; that the conditions at the time of this wreck were normal; that the switch in question was located on straight track, on level ground, in a clear country; that there had been no rainfall, for sometime previous to the accident which made it necessary or proper to keep track walkers doing service in the night time; that there were no unusual circumstances in being, which rendered it expedient for the defendant to have the switches, and switch stand inspected in the night time; that it was well known and well understood by all operatives of trains, including the deceased, that under normal conditions, the track, switches and switch points were not and would not be inspected in the night time; that the deceased knew on the night in question, or it is fair to assume that he knew that the switch and switch stand at the point in question had not been inspected later than six o'clock on the afternoon before; under this state of the evidence the deceased clearly assumed all risks growing out of the failure to inspect the track, switches and switch stand during that night.

It was one of the ordinary risks of the service, well known by all engineers, and for each and all of these reasons the verdict of the jury is against the manifest weight and great preponderance of the testimony."

46 Twentieth Assignment of Error.

The court erred in failing and refusing to set aside the verdict returned herein, and in failing to give the defendant a new trial on the sixteenth ground of its amended motion therefor, which was as follows:

"The evidence clearly indicates that the switch stand at the point in question had been tampered with during the night of the accident by some evilly disposed persons, and that but for such tampering of said switch, the train would not have been derailed. There are no circumstances in evidence which put the defendant company upon notice that this switch stand was likely to be tampered with or that it ought to be inspected during that night. The conclusion is irresistible that the switch was in good condition prior to dark of the afternoon before, and for each and all of these reasons the verdict of the jury is against the manifest weight and great preponderance of the testimony."

Twenty-first Assignment of Error.

The court erred in failing and refusing to set aside the verdict returned herein, and in failing to give the defendant a new trial

on the seventeenth ground of its amended motion therefor, which is as follows:

"The evidence shows that the switch stand in question was a standard switch stand; that there was none better known to practical railroad men; that the track at the point was laid with 85 pound steel, the road bed was ballasted and that all parts of the track, switches, and switch stand were perfectly safe for the passage of trains and of this train; that the sole cause of derailment was the fact that the switch was partly open and that it could not have been open without either throwing the switch lever or forcibly removing the pitman rod from its connection with the switch stand. The evidence shows that the lever was in proper condition and the switch locked, but that the lug had been by force removed, which permitted some one to disconnect the pitman rod from the switch stand.
47 and that when it was disconnected the switch points were opened sufficiently to derail the train; that this occurred in the night time by an evilly disposed person and under circumstances that could not have been anticipated by the defendant railway company, and for all of these reasons the verdict of the jury is against the manifest weight and great preponderance of the testimony."

JOHN M. FURMAN,
TERRY, CAVIN & MILLS,
A. H. CULWELL,
Attorneys for Defendant Gulf, Colorado & Santa Fe Railway Company.

Filed July 17th, 1911.
E. E. UPSHAW,
Clerk District Court, Bell County, Texas.
By TOM. S. SAUNDERS, *Deputy.*

July 25th, 1911.

No. 7577.

MARY J. MCGINNIS et al.
vs.
G., C. & S. F. RY. CO.

Now comes the defendant and prays that the court grant it 30 days additional in which to file bills of exception and statement of facts, because it says that the statement of facts herein is voluminous to an unusual degree, and the stenographer, though exercising great diligence has been unable to prepare the same within the time allowed for examination, agreement of counsel and presentment to the court.

TERRY, CAVIN & MILLS,
A. H. CULWELL,
JNO. M. FURMAN,
Att'ys for Def'd't.

Filed July 25th, 1911.
E. E. UPSHAW,
District Clerk, Bell County, Texas.

July 25th, 1911.

Motion heard and granted and 30 days from this date granted to file bills of exception and statement of facts.

JOHN D. ROBINSON,
Judge 27th Judicial District of Texas.

48 THE STATE OF TEXAS:

No. 7577.

MARY J. McGINNIS et al., Plaintiffs,
vs.
GULF, COLORADO & SANTA FE RAILWAY COMPANY, Defendant.

To Officers of Court, Dr.

To Costs Accrued in Above Entitled Cause to Adjournment of —— Term, 191–.

Officers' Cost.

					Plaint.	Def't.
Dec.	22,	1909.	To	filing and docketing.....	.50	.....
"	"	"	"	Citation and copy.....	1.25	.....
"	"	"	"	Copy petition	2.25	.....
"	"	"	"	Filing return	.15	.....
Jan.	3rd,	1910.	"	Filing answer	.....	.15
"	4th,	"	"	Entering 2 orders amending.	.75	.75
"	14,	"	"	Filing interrogatories	.....	.15
"	"	"	"	Copy Interrogatories–Precept	.....	4.75
"	22,	"	"	Filing depositions	.....	.15
"	"	"	"	Continuance	.20	.....
May	28,	"	"	Filing interrogatories	.15	.....
"	"	"	"	Copy Interrogatories–Precept	2.25	.....
"	31,	"	"	Filing return	.15	.....
June	2,	"	"	Filing Cross Interrogatories.	.....	.15
"	"	"	"	2 copies direct & 2 X intergts.	3.00	3.00
"	"	"	"	2 Commissions to take deposts.	1.50	.....
"	7,	"	"	Filing interrogatories	.15	.....
"	"	"	"	Copy Interrogatories–Precept	2.25	.....
"	11,	"	"	Filing Cross Interrogatories..	.....	.15
"	"	"	"	Copy direct & X Interg't's...	1.50	1.50
"	"	"	"	Commis. to take depositions.	.75	.....
"	22,	"	"	2 subpœnas–13 addit'al names	.25	2.20
"	23,	"	"	Filing 1st Amend. Petition..	.15	.....

49 Bill of Costs—Continued.

					Plaint.	Def't.
June	25,	1910.	To	Filing Depositions	.15	.....
"	"	"	"	Subpœna Duces Tecum.....	.....	.50
"	"	"	"	Subpœna, 5 Add'tl names...	.....	1.00
"	27,	"	"	Filing depositions	.15	.....
"	"	"	"	Filing 1st amended answer..	.....	.15

"	"	"	"	Filing return	.....	.15
"	"	"	"	Subpœna–5 addt'l names....	1.00	.....
"	28,	"	"	Filing depositions–Contin'nce	.15	.20
"	30,	"	"	5 Witness Affidavits.....	.....	2.50
Nov.		"	"	Continuance	.20	.....
Feb.	25,	1911.	"	2 Subpœnas–20 add'tl names.	.....	3.50
"	27,	"	"	Subpœna–4 Addtl. names...	.85	.....
"	"	"	"	2 Subpœnas–2 add'tl names..	.80	.....
Mch.	3,	"	"	Subpœna–Filing 2d Amd'd Pet.	.15	.25
"	4,	"	"	Subpœna–8 add'tl names....	1.45	.....
"	6,	"	"	Filing Ans. to 2nd Amend. Pet.	.....	.15
"	"	"	"	Filing & Dock. Mo. for Cont..	.....	.45
"	"	"	"	1 Affidavit—trial fee.....	.50	.50
"	"	"	"	Swearing & Empanneling Jury	.35	.....
"	6/7,	"	"	Swearing 35 witnesses.....	1.00	2.50
"	6,	"	"	Filing two papers.....	.30	.....
"	7,	"	"	2 subpœnas–5 witness aff'dvts.	3.00	.....
"	8,	"	"	9 Witness affidavits.....	.....	4.50
"	"	"	"	Filing charge–6 spec. charges	.15	.90
"	"	"	"	Entering Order Mistrial....	.75	.....
"	28,	"	"	1 Witness affidavit.....	.50	.....
May	30,	"	"	2 subpœnas, 19 add'tl. names.	.....	3.30
Jun.	5,	"	"	Filing 2d Amd. Ans. 1 Order	.....	.90
"	"	"	"	Swearing & Empanneling Jury	.35	.....
"	"	"	"	Filing two papers.....	.30	.....
"	"	"	"	Subpœna–Swearing 8 Witnesses	1.05	.....
"	6,	"	"	Swearing 37 witnesses.....	.....	3.70

50 Bill of Costs—Continued.

					Plaint.	Def't.
Jun.	6,	1911.	To	5 Witness Affidavits.....	.....	2.50
"	7,	"	"	Swearing 4 witnesses.....	.10	.30
"	"	"	"	2 Witness affidavits.....	1.00	.....
"	"	"	"	Filing Charge,—10 Spec. charges	.15	1.50
"	8,	"	"	Receiving & Recording Verdict	.35	.....
"	9,	"	"	Filing & Dock. Mo. for New Trial	.....	.45
"	14,	"	"	Filing & Dock. Amended Motion	.....	.45
"	"	"	"	2 witness affidavits.....	1.00	.....
"	19,	"	"	1 Witness Affidavit.....	.50	.....
"	29,	"	"	Entering Judgment	1.00	.....
"	"	"	"	Entering Order on Motions for N. T.....	.....	.75

July	17,	"	"	Filing and approving Bond..	.....	1.65
"	"	"	"	Filing Assignments of Errors	.....	.15
"	25,	"	"	Filing & Dock. Mo. to extend		
"	"	"	"	time	.....	.45
				Entering order on Motion...	.....	.75
Aug.	3,	"	"	Filing Statement of Facts...	.....	.15
"	"	"	"	Filing Duplicate State'mt of		
				Facts	.....	.15
"	12,	"	"	Transcript Fee	.....	40.50
"	"	"	"	Cert. on Statement of Facts..	.....	.75
"	"	"	"	Taxing Costs and Copy.....	.....	.25
"	"	"	"	Sheriff's Fee, Bell Co. Texas.	18.05	40.95
				By Jury Fee paid by Pl'ff.....	.....	5.00
				To Notary Fees, E. E. Upshaw,		
				D. C.	.....	1.50
				E. Robinson, N. P., O. R. Por-		
				terfield, N. P.....	51.60	.....
				$ E. Green, N. P.....	7.30	.....
				To Wit: Fees, A. L. Shattuck,		
				J. W. Hardy.....	7.44	.....
				W. S. McGregor, W. J. Hester,		
				J. E. Newman.....	10.60	5.52
				R. L. Painter, Lankston Jones...	.....	12.90
				J. D. Epperson, J. H. Talley,		
				J. Epperson	8.40	4.64
				John Stevenson, B. G. Hawkins.	.....	9.60
51				E. F. Gresham, A. F. Mathis,		
				E. T. Mathis.....	12.00	6.88
				J. R. Mathis, J. E. Hewitt.....	.....	10.56
				W. M. Thurman, W. L. Reeves,		
				R. L. Barton.....	8.28	9.60
				Total amount of Costs...	$158.12	$196.00
Nov.	7, 1910.			By Cash, Defendant.....	.....	$28.20
				To Balance Due to Date..	.....	$325.92

THE STATE OF TEXAS,
County of Bell:

I, E. E. Upshaw, Clerk of the District Court in and for said County and State, hereby certify the above to be a correct account of the costs chargeable to the plaintiff- and defendant, in above entitled and numbered suit up to this date.

Given under my hand and seal of office at Belton, this 12th day of August, A. D. 1911.

[SEAL.]

E. E. UPSHAW,
Clerk District Court, Bell County, Texas,
By TOM S. SAUNDERS, *Deputy.*

THE STATE OF TEXAS,
County of Bell:

I, E. E. Upshaw, Clerk of the District Court in and for Bell County, Texas, do hereby certify that the above and foregoing transcript contains a true and correct copy of all proceedings had on the trial of the above numbered and entitled cause, together with a true bill of the costs therein incurred.

Given under my hand and seal of office, at Belton, this the 12th day of August, A. D. 1911.

[SEAL.]

E. E. UPSHAW,
Clerk District Court, Bell County, Texas,
By TOM S. SAUNDERS, *Deputy.*

52 (Endorsed:) No. 4986. Gulf, Colorado & Santa Fe Railway Co., Appellant, vs. Mary J. McGinnis et al., Appellees. From the District Court of Bell County. Applied for by John M. Furman, attorney for appellant, on the 7th day of August, 1911, and delivered to Jno. M. Furman on the 14th day of August, 1911. E. E. Upshaw, Clerk District Court, Bell County, Texas, by Tom S. Saunders, Deputy. Filed in Court of Civil Appeals at Austin, Texas, the 23rd day of August, 1911. R. H. Connerly, Clerk, Court of Civil Appeals.

53 No. 7577.

In the District Court, Bell County, Texas, June Term, A. D. 1911.

MRS. MARY J. MCGINNIS
vs.
GULF, COLORADO & SANTA FE RAILWAY COMPANY.

Statements of Facts.

Be it remembered that the following is a full and true statement of all the facts adduced upon the trial of the above entitled and numbered cause on June 5, 1911, before his Honor, John D. Robinson, Judge of said Court, and a jury:

Present: Messrs. Pearce & Curtis, for the Plaintiff.

Messrs. A. H. Culwell and John M. Furman for the Defendants.

54 WALTER S. MCGREGOR called as a witness on behalf of the plaintiff, being first duly sworn to tell the truth, the whole truth and nothing but the truth, examined in chief by Mr. Curtis, testified as follows:

My name is Walter S. McGregor. I live in Temple; have lived there all my life, about twenty-eight years. I am in the business of manufacturers' agent—representing manufacturers.

I knew W. T. McGinnis in his lifetime. I recall the circumstances of his death. It was on the morning of the 6th or 7th of October, 1909. On that occasion I was traveling from Austin to Temple. I came by way of the International and Great Northern Railroad,

by way of Milano and the Sante Fe. Milano is down below Cameron on the Santa Fe. They had special equipment coming over the line. I was in the smoker of the through car. I was in the same car that I had left Austin in. That car was transferred to the Santa Fe at Milano and came on towards Temple. I know where Silenus is. It is about three miles south of Temple on the Santa Fe Railroad. By my watch it was 2:10 in the morning when we reached Silenus. When I reached Silenus that night—on the night of October 5th or 6th—I found that there had been a derailment of the southbound passenger train, known as No. 17, of the Santa Fe. That is their fast train from Cleburne to Galveston. When we approached the wreck, we approached very slowly and I got off of the train together with a couple of others and went up to the wreck. On the right hand side, going southward, the engine was lying — and the tender was on the left hand side, looking southward, and the general derailment of the train was in the direction of the north—on the side of the track—inside of the track, or the northwestern side of the track. A number of cars, including the baggage and mail cars, were derailed. Some of the Pullman cars, and, if I remember, one of the chair cars stayed on the track. It might be that the chair
55 car did not stay on the track, but four or five cars remained on the track. The balance of them were derailed but standing up. The oil tender, or what we used to call the coal tender, was turned over on its side on the left hand side, looking south. At that point where the train was derailed there was a switch. I noticed a switch stand at that point. In looking up and down the track, the green light showed and the red light was sideways, so that a train approaching, looking down the track, would see a green light. That would indicate that the switch was lined for the main line—according to my knowledge of railroad ethics, that is proper if the switch would be closed. That would indicate that the main line was safe for the train to pass out. The green light was burning. I do not know the condition of the switch or the switch points on that night; did not notice to see whether it was open or not, only as to whether that train had run into an open switch. I didn't examine it.

Part of the derailed cars were standing over the switch. If I remember correctly, there were only two cars or possibly but one that had passed over the switch. The other car was partly astride of it; I don't think but one car had passed beyond the switch, so that after passing the open switch some of the train had been stopped and was standing over the open switch that had been split. I did not notice whether the engine was reversed. The brakes were set. The tender was in the ditch. That train was going south or southeast towards Galveston and the engine was on the right hand side of the track going south. It was pointing towards Temple—the front of the engine was pointing towards Temple, and the tender of the engine, the part that is behind, was on the left hand side. It was broke in two—there was just room enough between the first car and the tender to pass. All of the coaches were standing on their wheels so that the only part of the train that went into the ditch was the engine and

tender. That is the only part that went into the ditch. The other was standing up; it was still on the embankment.

56 I saw Mr. McGinnis. He was lying up on the side of the track on a blanket. He was supposed to be the engineer of that train. It is my understanding that he was in charge of that train.

Agreement.

It is admitted that Mr. McGinnis was killed and died from the result of injuries sustained in that wreck.

I said that it was 2:10 o'clock by my watch, in the morning. I do not recall having seen anybody on the train that Mr. McGinnis was running that I was personally acquainted with outside of Mr. McGinnis. There were several on there whom I knew by sight. If you were to bring them in front of me, I would recognize them. I do not know their names.

According to the Santa Fe schedule there were two passenger trains going south that night, about an hour apart. The one that was wrecked usually is the first one. I was on the passenger train coming north. That train was on time to the meeting place. It is my recollection that we were to meet between Rogers and Cameron. Not meeting there, we proceeded on. The same number of passenger trains ran north at that time as ran south—running opposite each other. I was on the first train. The other passenger train from the south, it seems to me was detoured around by way of the Sap—didn't come up to where we were. The engine was on one side; the head of the derailed cars was probably the same distance from the track on the north side of the track that the engine was on the south side of the track. I was there until about 5:30 in the morning. I came to Temple in an automobile. We had placed Mr. McGinnis on the car before I left, placed him on one of the sleeping cars.

57 The picture shown me, No. 1, is taken from about the center of the train, near the rear of the train, on the left hand side, looking towards the front of the train—the tender appearing on the left hand side. That is about the position of the train. As the train was going towards Galveston that appears to have been taken from the center of the train. That is about half of the train in the picture. There is the train I came up on in the distance. That is the engine on the left side looking north. This picture is taken looking north.

Picture No. 2 is taken from near the front of the train looking back towards Temple with the engine lying on the left hand side of the track and the train up on the track, and the derailment, of course, to the right. This picture appears to have been taken looking back towards Temple—this car appearing to have taken the direction of the tender there on the right hand side of the ditch, looking south, and this is the engine here.

Picture No. 3 is the picture of the engine itself lying on the

ground, showing the bottom of the engine and the wheels, after it was turned over.

From the open switch or from the switch where the train was derailed to where the engine was lying, it was a little over a car's length—about a car and a half. It was not the full length of the train. It was about four cars—I would like to change that—I remember that now—these things don't come back to me very rapidly It was about four carlengths. The coaches that were derailed were still standing about four in number, and the balance, about five in number, were standing on the track. In other words, there were four or five cars that were not past the switch, that never got past the switch; that train usually carries from eight to ten cars and I don't remember the number it carried that night, but four or five of them were left standing on the track.

That train usually makes about sixty miles an hour—I have ridden on it making that time. I don't know how fast it was going that night but it stopped in about four carlengths.

58 Cross-examination.

By Mr. CULWELL:

It is not a fact that about ten feet of the rear sleeper was all that was on this side of the switch—all that was on the Temple side of the switch, because we didn't put Mr. McGinnis into the last sleeper and they pulled him into Temple on the sleeper. They pulled the remainder of that train back to Temple and Mr. McGinnis was not in the last sleeper. About half of these cars were off of the track. None of them were turned over. The engine was not standing, part of it was on one side of the track and part on the other. That is not practically all of the train that had left the track. The derailed cars had left the rails and the baggage and mail cars were not on their regular line track. They were not turned over. The train was still connected except the engine and the tender. So far as the cars are concerned, they had never broken apart. I do not know anything about how fast that train was going that night. I don't know what caused the accident. All I know is when I got there I saw train No. 17 had been in an accident and as a result of that accident Engineer McGinnis was killed. I know a good deal about the case that I haven't been allowed to testify to. I also know that the light in the switch was still burning, and it showed a clear track.

J. H. TALLEY called as a witness on behalf of the plaintiff being first duly sworn to tell the truth, the whole truth and nothing but the truth, examined in chief by Mr. Curtis, testified as follows:

My name is J. H. Talley; I live in Temple, Texas. I have lived in Bell County about thirty-nine years, all my life. I was born in this county. I was raised three miles south of Temple. My father's name is John Talley.

59 I know where Silenus is. The Santa Fe Railroad has at Silenus two main line switches—they have six switches there. They might have a double cut-off there—I don't remember

about that—if they only have one cut-off, it is six switches. From the first switch to the last one at Silenus it is something like a thousand yards—something like that—I am not sure about that—from the road that leads up to my father's house to the big road down on the other side. There are switch tracks at that place and six switches.

On the 6th day of October, 1909, I held the official position of constable in Bell County, in Precinct No. 5, which includes Temple, in this county. I heard of the wreck and Mr. McGinnis' death. It was early in the morning when I heard of it. I went down to Silenus. The first switch is about 150 yards from my father's residence, where I was—the north switch—from our old home there. They have had a station there called Silenus only about eighteen months or two years, something like that. It has been built lately, possibly just in the last year or two—in recent months that this station has been put there, since I have lived there. It was before noon the next morning when I went down there, about 11 o'clock, something like that. I went down there twice during the day, once with Mr. McKay and once I went on horse back. That was John G. McKay, the State Purchasing Agent, at that time he was Claim Agent for the Railway Company. When I got down there, I don't know whether the whole train was derailed or not but there was some cars derailed, off of the track, and the engine was turned head towards Temple and the tender, I think, was on the left side going south. The engine was on the right side going south and the tender was on the left side going south. I did not notice the engine as to whether or not it had been reversed. The engine had been torn loose from the train and that would naturally apply the air. To break the hose or anything like that would apply the air on the train and it had been so long that the air would have leaked out. However, I can't tell whether it had been applied or not.

I do not know how fast the train was going. The train was something like three or four rail-lengths from the open switch after it struck—you can't tell just exactly how far that engine had been—it was turned back and the tender had gone down the track too. The best I recollect, I believe that a car was standing just about over that switch. There was some cars standing right there. I noticed the condition of the switch. The switch point at the time that I was there, the morning after the wreck, about 11 o'clock, of the next day, the switch point on the left hand side was a little bit open. I am speaking of the left hand side of the right rail going south—I mean on the right hand side going south, and the point I could almost run my little finger between the point of the switch at that time and the main line rail. The cars were still standing there. There was three or four cars standing, the others kind of leant on the side of the track like. The switch was open to the extent of about the width of my little finger, something like that—perhaps not so much but some little gap in there. The condition of the switch point that fitted up against the rail at that time was that it was a little worn and crumbled, that is the point was worn off and

crumbled. The condition of that point would have made it a defective switch—anything of that sort would make it so an engine would be quicker to take hold of it, of a bad point than it would a good one that was perfect. This switch point fitting up on the main line rail fits up on the inside of the main line rail, so that if it is a sharp point fitting up close to the rail, the wheel will go onto the main line. It looked like a split switch to me. I could not tell whether this particular train had gone between the point and the rail. I saw where it left the track. That would indicate that that engine went through the switch. I say that that switch at that time looked to me like a split switch. By a split switch I
61 mean this, that a train going through a switch without it being thrown is a split switch—you can back through it or head through it, coming from the side track to the main line. The effect that would have would be to break this bridle rod or bend that or do something like that. It is going to force its way through there. It looked just like a train had been through it. I have been in the railway service and am familiar with railway service in the transportation department. I worked in the capacity of brakeman. I stated that this looked to me like a split switch, and I then explained how a split switch was made. I examined the switch points with reference to whether or not it was crumbled or worn off. It was worn some and crumbled a little bit. That was not a perfect point. It was not at the time I seen it. I would say that a train was more likely to split a defective point than where you have a perfect point. If the switch is perfect, a train has no right to split it. There is more danger in passing over switches than other parts of the track on account of the dangers incident to defective points and being more easily interfered with—if the switch is in bad repair it is more dangerous than other portions of the track—there is an element of risk and danger in passing over switches that does not exist on the main line on account of the switches being left open or in bad condition. If it is split that is dangerous. There are more dangers in trains derailing at switches than at other points. A switch is a break in the track. I could not tell from my observation, as a railroad man, what caused the derailment there. It looked to me like the engine split the switch. If the switch had not been partly open or if the switch had not been defective, the switch point, I would not think it would have been any more apt to do it than any other place. It can, of course, leave the track at any place but it should not if the track was in good repair. A train could not split a switch unless it was partly open or defective. It would be impossible.

62 Cross-examination.

By Judge CULWELL:

I visited the place of this wreck about 11 o'clock on the day that it happened. I was there in the forenoon about 11 o'clock, assuming that it happened during the night. I don't think there was a car on the track at the time I was there. The whole crew there was working to get them back. I don't know how many cars left the

track at the time of the wreck. I don't know whether they picked any up before I got there or not. The rear end of the train was about the end of this switch, about even with it. There had been a great many people down there, there was several there when I got there.

I made an examination of the switch stand. I do not know whether the switch stand was in the same condition when I got there that it was at the time of the wreck. I believe the bridle rod was disconnected from the switch stand when I was there. It was either on or off. We took it off and put it back while I was there. I can't tell you whether it was on or off but it was taken off while I was there.

I have been a railroad man, a brakeman. Railroad switches are absolutely necessary to the running of trains, in other words, you can't run a railroad and get trains over the tracks without having switches. All railroad men, I would say, know that. They ought to. I knew Mr. McGinnis. He was working for the company when I went to work for them. Mr. McGinnis had been over this track several times that I know of. Mr. McGinnis knew where the Silenus switch was. When I got there the switch was partly open at the point. It was something like—I don't know whether it was as wide as my finger or what. Perhaps it was one-half, maybe three-eighths, or perhaps it was half an inch. I would say then that the switch was open as much as three-eighths or one-half an inch, some-
63 thing like that. There was an opening there. I don't know, of course, what the condition of the switch was at the time of the wreck, whether it was open or closed. I really don't know what wrecked that train. I simply know that when I got down there that train No. 17 was wrecked, was standing there, and that the point of the switch, the north switch at Silenus was open as much as three-eighths or a half inch, something like that. The point of the switch was battered. It was crumbled a little or worn for about three or four inches back from the point.

I recognize the surroundings shown in Picture No. 3 shown me. That looks like the north switch at Silenus. I see on that the switch point. I can't tell you whether that looks like the switch point that I saw on the morning after the wreck. This switch down here was open just a little bit right along there, under here; assuming that this is at Silenus, that represents the left-hand rail going south, and that represents the switch connecting with the left-hand rail, the north switch at Silenus on the left-hand rail, the switch point. That is the point that was next to the switch stand. That is the point I saw battered—that is the switch where it happened, here right here. Assuming that that picture was taken on the 7th day of October, which is the day after the wreck, as to whether that gives the correct representation of both of the switch points, I will say that I can't see the point on this switch here. You haven't got that plain. Can not see where the point begins. This point here was worn there and wasn't as high as this rail. I think that does represent Silenus north switch. If it is not plain there it is a misfortune of the picture, but I don't see anything around there that

would make a man know. I don't see anything there that would really make a man know it was Silenus. I see the sign there; they have got just such a sign as that at Silenus. They have got a field off there on the left hand side; there is a creek and there is Mr. Huey's house there. There is a fence there that looks like the place.

64 (The defendant then offered the picture No. 1 in evidence, showing the switch in question.)

From an examination of picture No. 4 to see if it looks like Silenus, will say it looks like the same thing, the way the switch is lined up. That represents the north switch at Silenus. The switch in that picture is lined for the main line. The point that was bent and worn is the right hand point going south in that picture. That is the point that fits up against the right hand rail going south. That is the one that I saw that was bent from three-eighths to a half inch, something like that. I don't know when nor how the point of that switch was crumbled. I have seen these big twelve hundred class engines that the Santa Fe uses on these night trains; I think they use the twelve hundred class, anyhow, they are big engines. I did not notice what class engine it was that was on that train that night. I don't believe that I noticed the number of that engine—I am not sure about that. If some wheel of that engine of that train had struck the switch point, it would have crumbled it as badly as what I saw. I can't say that the fact that the switch point the next morning showed to have been battered and crumbled indicated that it was that way before this train passed over the track, because this very engine could have battered that switch point, and if that switch point had been open just enough to catch the flange of some wheel, then that engine striking that point would batter it as badly as what I saw there—I suppose so. As to how long it had been in that condition, will say that the first part of the switch point that fit against the rail was old but back further on it looked new. These switch points that I speak of go down to a pretty sharp point so that they can fit up against the rail. That is a very sharp point. In pictures No. 2 and 3, this is the bridle rod here (indicating). That is the rod that connects the tracks with the switch stand. The condition of that switch stand at the place where the bridle rod ought to connect with the switch was that this lug that fits
65 over the stand there was gone. The lug that fits over the top of the bolt or rivet that holds the bridle rod, or connects it, rather, to the switch stand was gone. You could take that bridle rod off and leave it off—I am sure that we played with it there that day, back and forth. If that bridle rod was disconnected from the switch stand then the switch stand did not control the movement of the rails out there. It was off like that picture shows. You could take it off when I was there; there was nothing to hold it in place.

The defendant offered in evidence Picture No. 3.

The long rod running to the side of this tie on which the switch stand sits, is called the bridle rod. That connects with this switch

point and runs underneath the main rail there and fastens on here and also on the one on the opposite rail. There is a lever at the switch stand that you throw or turn and that little lug that protects the bolt, and that works the switch points, either opens or closes them, if you desire. Now, the lug that holds this bridle rod at the switch stand and connects it with the switch stand was gone, so that you could just take this bridle rod off of the switch entirely and when it was in that condition, of course, it did not have any control at all over the rail.

The defendant thereupon offered in evidence the four pictures, Nos. 1, 2, 3 and 4.

This one shows the switch in proper condition and the track lined up properly for the main line. That is correct. There is a little spring or something like that that works in this guard rail here. If you were to disconnect the bridle rod I can't tell you whether that would cock the switch—the natural spring of the steel.
66 Perhaps the natural tightness of the switch would, it is owing to how plumb the switch was. The tendency of the switch would be to open a little if there was no bridle rod there. I saw the switch stand the next day and from that, assuming for a moment, that the switch was in the same condition the night before when this train went through it, the bridle rod was disconnected from the switch stand and that as a consequence the switch was cocked or partly open, that would have derailed the train.

I think that section men work only about ten hours a day start in the early forenoon and quit in the afternoon. They begin work something like 7 o'clock in the morning and I think they quit at six in the evening. These are the only regular hours for the regular section men to work. Early in October at six o'clock it was something near sundown—I don't know just how long until sundown. It was not dusk at six o'clock. I had been a peace officer for some time before that around here. This was in my precinct—this switch. I was always looking out for violations of the law, trying to enforce the laws, and trying to protect property. That was part of the duties of my office. Prior to the fifth of October, I did not know of any fact or circumstance that would lead me to believe as an officer, that anyone would try to tamper with that switch. That would have been a violation of the law and I would have so regarded it and would have looked after it if I had known it. I was on rather intimate terms with the special officer of the Santa Fe, Mr. Miller, and the chances are that if they had known of any fact or circumstance of the kind, they would likely have told me. I was associated with them very frequently, with Mr. Ed Miller and Mr. McKay also. I did not have any fact or circumstance or anything of that kind that made me suspicious that anyone was likely to tamper with that switch prior to the 5th of October, 1909. The weather at that time was good. It had not been wet weather. As an experienced railroad man I did not see anything in the condition of the weather or any suspicious circumstance that I knew of
67 that made it prudent that the railroad company should have that switch watched at night. I have heard of railroads keep-

ing inspectors on the track and switches at night when the weather is good. It was not customary with the Santa Fe. It was not customary with the M. K. & T. The M. K. & T. and the Santa Fe are the only railroads I ever worked for. It was not customary on either of them.

Redirect examination.

By Mr. CURTIS:

In looking at that picture a while ago I stated that the defective point was on the right hand side going south. That defective condition in that point seemed to be old on the first part of the point. Mr. Culwell asked me a while ago if I knew of any fact that would put me on notice that anybody was likely to tamper with that switch. Afterwards I saw this lug that they call it, that holds this rod, was gone, and I couldn't see whether it had been tampered with or whether someone had broken that off or what. The switch looked split to me. On this switch that was split, if the bridle rod had been disconnected there would have been nothing to prevent that from moving back and forth towards the switch. If that bridle rod had been disconnected before this engine struck it, it looks reasonable to say that the flange of the wheel would have pushed that over and not bent it at all. There would have been the wheel of the other side of the engine to have prevented it from pushing it over. When the bridle rod is taken off of the switch stand, that leaves it loose and it has to be in a cramped position before you can bend this point, and there is nothing to keep it from going over towards the other rail if the bridle rod is disconnected. I did not say that it was customary with some of the roads that I knew of to inspect at night; I have heard of them. He asked if I had heard of it. I have heard of track walkers at night but I never saw them. I have heard
68 of them having track walkers at night to inspect their switches but I have never seen one of them.

Temple was only about three miles from Silenus and is a town of some eleven or twelve thousand people. There is a Santa Fe division point there. From that point the trains go on to the west, to Angelo and north Cleburne and south to Galveston. The Santa Fe hospital is there, and division points leading in each direction from Temple. The M. K. & T. Railroad also runs through Temple, going north and south.

Recross-examination.

By Judge CULWELL:

There is some little law breaking in Temple; I don't suppose there is any more than there is anywhere else for the same amount of people. While I was an officer over there we came nearer looking for a crook in Temple than in Heidenheimer or Rogers. I can't say that there was any more reason why there should be train wreckers loafing around Temple any more than any other important railroad center in Texas. It is my contention that there is more lawlessness in Temple than in Heidenheimer, population considered. That is true every where.

E. F. GRESHAM called as a witness on behalf of the plaintiff, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

My name is E. F. Gresham. I live in Fort Worth and am a railway mail clerk. I was engaged in that same business in October, 1909. I was not in charge of the United States mail car on the train on the night of October 6th, when Mr. McGinnis was killed—I was on the car with another fellow. I was in the mail car, in the service of the government. I first got on that train
69 at Fort Worth. Mr. McGinnis took charge of that engine at Cleburne. I rather think Mr. McGinnis lived at Temple at that time. I am not sure but I remember seeing his folks meet him at Temple at times. His run was supposed to end at Cleburne, as I understand. The train that he took charge of at Cleburne was Santa Fe No. 17. That is the fast passenger train. I can't say whether that is one of the best runs on the road or not. That is a good run, supposed to be. I came through Temple that night. I do not know whether we were on time or not. We left Temple a little late, it was between 15 and 25 minutes late, I am not sure just exactly. The usual and customary rate of speed in making the regular time of that train from Temple going toward Heidenheimer is, I suppose about fifty or sixty miles an hour. I know where Silenus Switch is from Temple. It is about three miles from Temple. I suppose we were running about sixty miles an hour that night when we got to Silenus. That is pretty fast speed for a passenger train. It is not more than that train runs a great deal of the time. It is a very fast train. As we approached Silenus, looking down the track, I did not notice any warning or signal of any danger; I saw the light—a green light. The green light was burning. That indicates that the track is clear, go ahead. The red light would be burning to indicate danger or that the switch was turned, but the green light was burning. Going along at sixty miles an hour, the first indication I felt that there was anything wrong was the sudden stoppage of the train. It seemed—I don't know for sure whether the engineer reversed the engine or applied the brakes but in either case the train began stopping at a—it just began to slow down very rapidly. It was a very sudden stop. Mr. Greer was on the engine that night with Mr. McGinnis, I think. I think he is here. The first thing I noticed was the sudden stopping of the train. I grabbed the rods in the car—there is a rod runs through one end of the car and I cried to the other fellow that was with me—without reference to what I said, I could not tell about how
70 far the train ran until it stopped, not until afterwards. None of the coaches turned over. We are due out of Temple at 1:10, I think it is, and it was about 1:40 between 1:30 and 1:40—possibly 2 o'clock, at night. I got off of the train after it stopped. The engineer was on the right hand side where the mail car stopped, nearly even with it; the tender was on the left hand side a little further up. I saw Mr. McGinnis there. I examined the switch. It was crumbled some and it looked to me like there was part of it gone, that is the switch point. That was on the right

hand side, going south. That switch was open some, I can't say just how much but it was, I remember, open some. That train was standing there with part of a coach over the switch point, so that the entire train had not passed over the switch where the derailment occurred. I did not see the switch until about daylight the next morning, about sunup, I suppose. I had been there all the time. That was as quick as I could get relief. I was with the mail at the time.

Cross-examination.

By Judge CULWELL:

I am a railway postal clerk. The duties of that position are handling mail, distributing letters and sending them to different places, letters and papers. My regular run as I remember it at that time was on trains Nos. 17 and 18 of the Santa Fe, between Fort Worth and Galveston. I did not have a thing to do with the running of the train. It was not part of my duties to examine the track and it was none of my concern about the condition of the switches. I was representing Uncle Sam. The only thing, I was injured some in the wreck myself, and of course, I wanted to see the probable cause of it. That is no more than any other passenger would want to know, that the track was all right, but it was certainly not part of my duties on the job I held to examine the track. I was kept busy part of the time on the job I had, until I was relieved. By "relieved" I mean when the Company sent a man to take charge
71 of the mail I was relieved from further duty. That car on that night picked up some mail at Temple. I was supposed to work that mail. I mean by that if we had a piece of mail going to Rogers, we are supposed to get it out, if we have a piece for Galveston, it would go in the Galveston sack. I had worked the principal part of that mail when I left Temple. Another duty I have is looking out for side stations; we take on mail at all these stations even though we don't stop; we have a crane there that we hang up and it is my duty to look for these. If I carry by a pouch or fail to get one, it is charged against my record. I had got mail at Temple. The car that I work in is 30 feet, with paper tables and paper sacks along in the car and pigeon holes for the letters. That is the inside of the car. That car has doors on either side. That is not the only way we can see we have windows all along the car; windows all along the rear end of the car, the rear end of our part of the car, I mean, along the sides at the rear of the car on each side of the car. At the front end or in front of the door there is no windows but back of the door there are windows strung along there every few feet. These windows are up some distance from the floor. A person can see out of them, though. You can't very well see out of them and see a switch stand; I did not see any switch stand through a window. I got mail at Temple destined for various stations in south Texas. I hardly think I might have had foreign mail on there too. I might have had Mexican mail on there, some Mexican mail. It was my duty to see that all that mail was segregated and was put off at the right station and that mail going

on other railroads was properly transferred; that is part of my duties. I also pick up these pouches there the train did not stop and that mail had to be distributed. Temple is a pretty good sized town. We handle a great deal of mail out of there but there is a great deal of it worked out and fixed up. For that train to run from Temple
to Silenus, about three miles, going say sixty miles an hour
72 that night, I don't know how long it would take, getting in
and out and the block; sometimes it takes longer than other times. It ought not to take five minutes but sometimes they have to wait for the blocking and other things. I don't know that they were not making any sixty miles an hour that night if they had to wait for the block; they can pick up speed pretty fast. It is a part of my duties to look out for Silenus Switch because of the fact if I wasn't there I couldn't tell if that was Silenus or Heidenheimer from the fact that I might have been busy or something else. It is a custom that I never fail to do. If it had been Heidenheimer, I would not necessarily have looked out the door on the other side. I sometimes go to one door and sometimes the other. I am usually pretty familiar with the country and I look just to locate myself. We don't get mail on No. 17 at Heidenheimer; we put mail off there. We would not have to take mail on there. I did not know that I was not at Heidenheimer. As I stated a while ago, I wasn't real busy that night. The station house to the town of Heidenheimer was on the other side of the track from the door I went to I had the right to go to both doors if I wanted to. I think I could tell by going to that door whether it was Heidenheimer or not. I have been over the road so that I think I could tell from the houses and things around there. I think I could. There was nothing that attracted my attention to the switch lights more than I always look at switch lights when I go to the door. I don't know how many switches there are between Fort Worth and Galveston. I remember seeing another switch light up here that was red. I don't know that the reason it impressed itself on my mind was because it was a red light and that meant danger, but I just noticed it. I don't know what there was about this switch light that made me want to notice it that night; just curiosity, I don't know. I don't know whether I looked at the switch lights at Pendleton that night. It has been a year and a half ago and I don't know. I don't know
whether I looked at the switch lights at McGregor but if
73 something had impressed itself on my mind, I would have
known. That is not an afterthought: something that occurred to me after the wreck. There was no reason why I should go to the door especially to look at the switch light at Silenus Switch but I went to the door and looked out and I recalled after the wreck that the light was clear. It was still clear after the wreck, showed a clear track, and the bridle rod that connected the switch was disconnected, so that when it was disconnected that bridle rod did not have anything to do with that switch stand. When I went there the switch light was showing a clear track but the bridle rod that connected that with the track was disconnected. That was disconnected there and the lights showed a clear track. The bridle rod was disconnected at

the foot of the switch stand. That rendered the switch absolutely powerless so far as the track is concerned—it looks to me like it would be. I don't remember noticing that the nut that held this bridle rod onto that pivot was off and gone. I know that the bridle rod is held in place there so that it can't be moved without great force. I saw that night that the bridle rod was disconnected and yet the light showed a clear track. I also noticed on the night of the wreck that the cross over switch was partly open, partly thrown. It looked like the point of the switch was gone. I don't know how long it had been gone. I don't know what caused it to go. I don't know but what some train or the front wheel of the engine had struck that switch point and broken it off—I don't know anything about that. I said the bridle rod was disconnected when I got there. I didn't see it until about daylight the next morning. As that nut was gone and the rod disconnected, and as the switch was partially thrown or cocked, it could have been struck by one of the wheels of that train—it is possible. I never had any experience along that line. Judging from other times when I had timed the train, I thought it was going at the rate of sixty miles an hour that night. I did not time it that night, I suppose, simply because I did not want to. I might have had some-
74 thing to do up to that time, so far as the government was concerned, but not at that particular time. Our mail is made up in one and two, and Heidenheimer and Roger are holdouts. From what I remember, that engine was about five cars or six from the switch stand. I don't remember now how many cars we had in the train. I don't know how far the rear end of the train was from the switch stand—how far this switch stand was from the rear end of the train when it stopped—I did not pay any attention to it. I was back there but probably I did not notice it at all. I think one car was standing on this switch. I don't think it was the last car in the train. I did not testify on the last trial of this case that the last car in the train was standing about ten feet from the switch stand; I deny that. I examined the switch points by looking down under the car. The car was up some distance probably. I stooped over there—I don't know just what position I got in. I didn't crawl under there. I didn't testify on the former trial that I did crawl under there. I deny that. I was asked that question and I said I did not. I was asked this question on the former trial: "You went down there the next morning?" I answered that question: "Yes, we had to go to Temple." "And I crawled under and looked under the cars to see the condition of the switch." I was asked that question. My answer to that question was that I did not crawl under it. I said I looked under the car. To the best of my recollection I said it was not necessary for me to crawl under the car.

I am still working for the government. I am not unfriendly to the Santa Fe. I haven't got a thing in the world against the Santa Fe. They treated me just as nicely as can be. I always say a good word for them when I can. I can prove that in Fort Worth from people who travel. I don't remember any correspondence that the Santa Fe has ever had with me only in regard to the settlement of my claim, a personal matter.

J. E. NEWMAN called as a witness on behalf of the plain-
75 tiff, being first duly sworn to tell the truth, the whole truth and nothing but the truth, examined in chief by Mr. CURTIS, testified as follows:

My name is J. E. Newman. I live in Temple, have lived there about five years. At the present time I am engaged in the business of running a beef market. My occupation in 1909 was that of brick man for the Santa Fe railroad. I was working for them in the Temple shops.

I knew Mr. W. T. McGinnis in his life time. I remember the circumstances of the wreck in which he was killed—I remember the occasion. I went down to Silenus the next morning, about 7 o'clock, where the train was wrecked. At that time I was in the employ of the Santa Fe. I noticed the switch when I got down there. The first thing I seen when I got there was the switch and there was some people around there looking at it. I noticed the switch point at that switch. It was the switch point fitting up against the right hand rail that I noticed. It was about three-quarters of an inch off on the right hand rail—it was crumbled off about twelve inches from the point that goes to the main line rail. It was crumbled about twelve inches up against the point that lays against the rail on the left hand side. That seemed to be new, worn up further than where it started. Down here it was old. That had the appearance of having gradually worn through—looked sharp. I have noticed lots of switch points noticed the gradual working or crumbling off. I have never been employed in any track work. I never examined these switch points for the purpose of determining their condition; I was just looking over it. I saw that was crumbled off about twelve inches. Where it started off it was sharp and crumbled off and when it got up here about ten inches, some new bits had been broken off as if some new break—when the flange struck it, it broke off and dropped down between the main line and the switch. The front part looked sharp and old where it had been worn off—filed off—something sharp. The switch was
76 open about three-quarters of an inch when I got there. The point was worn away about twelve inches on the switch flange next to the main line rail on the right side, being room for the flange to run between the switch, causing the flange of the driver to catch on that and drop off from the main line rail onto the switch. Mr. Hardy and George Coleman went down there with me. They went just in front of me; I came behind them and they were ahead of me. I had noticed the condition of the Pitman rod. I do not know what had become of the lug—it was gone. I don't know whether the light was burning or not. I never noticed whether the light was burning or not.

Cross-examination.

By Judge CULWELL:

I went down to the wreck about seven o'clock the next morning. D. McKay was there when I got there and George Coleman and Mr. Hardy; they was the only ones there at the time that I knew. I

said D. McKay but it was John McKay. That switch was open about three-quarters of an inch. The cars were down below the switch. There was no car over the switch then. I did not measure to see if that switch was open three-quarters of an inch. I know John Talley. If he says it was three-quarters of an inch—if he says it was open three-eighths of an inch, I don't know whether he is mistaken. I was just guessing at it. I think three-quarters of an inch is something about like that (indicating on finger) that is about the only way I can get at it. This switch was open about that much and the switch point was worn off twelve inches. I did not measure that. If Mr. Talley testifies that it was worn from three to four inches, I would not say that he was mistaken. I would not say that anybody was mistaken. I am just guessing about it. That is what I guessed at down there. All of the testimony I have given is based on what I guessed down there. I did not have anything to measure with.

My name is J. E. Newman. I am the same J. E. Newman
77 that these two gentlemen filed a suit against the Santa Fe for, for serious permanent personal injuries. I am seriously and permanently injured.

Redirect examination.

By Mr. PIERCE:

That injury was to my eye and the Santa Fe paid the claim without any litigation. They paid every dollar of it.

W. N. THURMAN called as a witness on behalf of the plaintiff, being first duly sworn to tell the truth, the whole truth and nothing but the truth, examined in chief by Mr. PIERCE, testified as follows:

I live southeast of Temple and my initials are W. N.—W. N. Thurman. I am in the farming business. I remember the time when Mr. McGinnis was killed at Silenus. I went down to the scene of the wreck the next morning. I saw the condition of the switch point on the right hand side as you go south. It was open—seemed to be open and gapped up—I mean slugs out of it. That was at the point where the engine derailed. The point tapers off at the end. When I got down there, there was several people standing around—quite a crowd—I don't know how many—talking and then down there about fifty or a hundred yards where the train was all tangled up—the cars—and the switch was all gapped up. It didn't look like it was fresh—it wasn't recently done. It was just gapped up. I didn't see any fresh signs. I could not tell from looking at it, how long it had been wearing or crumbling off.

Cross-examination.

By Judge CULWELL:

I don't know what caused it to gap or crumble off. There was just gaps there.

J. W. HARDY called as a witness on behalf of the plaintiff,
78 being first duly sworn to tell the truth, the whole truth and nothing but the truth, examined in chief by Mr. CURTIS, testified as follows:

My initials are J. W. I live a mile and a half southwest of Temple. My occupation is farming. In October, 1909, I was working for the Santa Fe. I was not personally acquainted with Engineer McGinnis during his lifetime. I remember the occasion of the wreck at Silenus in which Mr. McGinnis was killed. I went down to the scene of the wreck the next morning. I got down about seven o'clock. When I got there, the switch was partly open—about an inch. The point of the switch was crumbled off. That point was crumbled off for about ten or eleven inches. There was part of that crumbling that was new and part of it was old. The starting in of it was old.

Cross-examination.

By Judge CULWELL:

At that time I was working for the Santa Fe in the shops. The condition of that switch point before the train went over it that night was that it was partly crumbled off. It looked like it had been gradually done. It was supposed to have been put in new. Just before this accident the condition of that switch point was partly crumbled off. I know that because it was an old crumble. I could tell that because it was rusty. That is my opinion about it.

Redirect examination.

By Mr. CURTIS:

I am stating what I saw.

Mrs. MARY J. MCGINNIS called as a witness on behalf of the plaintiff, being duly sworn, examined in chief by Mr. CURTIS, testified as follows:

My name is Mrs. Mary J. McGinnis. W. T. McGinnis was my husband. I resided at Temple prior to my husband's death. I have resided there since that time, at the same home. My home was on North Ninth street in Temple. That used to be Second street
79 many years ago. I have lived there twenty-one years; that is, lived twenty-one years in Temple. Mr. McGinnis had been in the employment of the Santa Fe railway over twenty years prior to his death. He served them in the capacity of engineer. At the time of his death he had the main line run from Cleburne to Bellville yards, on train 17, I think. That is the fast passenger train from Cleburne to Galveston. Mr. McGinnis was fifty-one years old. His run paid him two hundred and thirty some odd dollars $220 is what he made, I think; that is, outside of overtime; he always made overtime. If they double the run or take in somebody's place they made extra time. That is considered one of the best runs on the road.

I remember the circumstance of Mr. McGinnis leaving home on

the afternoon before his death, he stayed home until he just had twenty-five minutes to take his run, going to Cleburne to bring his run out. He made one trip and a half and came in on Wednesday morning the night he was killed. He left home on Sunday and had made one run and back to Temple and started on another run, and not until Sunday following had I seen him for two or three days, his watch stopped at two o'clock on the night of the wreck, and I think it happened about two and they got him to the hospital about five. Mr. McGinnic and I had been married twenty-four years. twenty-five years the coming December after he was hurt. We had four children. Mrs. Saunders is my daughter, she is sitting here, she is twenty-two years of age now; at the time of Mr. McGinnis' death she was twenty. The next child is Leland, sitting here; he is nineteen years old; he was nineteen years old at the time of his father's death. The next child is thirteen; that is Lisle, sitting here. The next child is Lamar, the baby, four years old, three years old at the time. These children of whom I speak are all my children and Mr. McGinnis' children. I have been married only one time. Mr. McGinnis had a mother at the time of his death. She is dead. Mr. McGinnis was a home man; he was no man to be away from home when he was in town, was always home and attended strictly to business and turned all his money over to me as any good man will do.

Cross-examination.

By Mr. CULWELL:

I do not recall the month during the last twelve months that Mr. McGinnis made as much as $220. He did turn the money over to me. I did know how much he was making, but I did not always set it down. I do not know exactly what it was. He received pay from the Santa Fe once a month, and that was all made on pay check; that pay check covered all the railroad company owed him for some particular month, I guess. If he was now in the service, about the 15th of this month he would receive a check for all that the railroad owed him for the month of May. They generally got paid about the 15th or 18th somewhere along there. I think I know his handwriting. The check now handed me is one of his pay checks, likewise the others handed me. The last one, $213, is the one I collected. I suppose that is his handwriting on these checks here. The run he had paid him just what he made out of it, paid him over $230, is what I meant. He was not paid by the month, but so much a trip, so much a mile; he always got in all the time he could. Even though these checks, added up and averaged, would average only $137 a month, yet he would have been entitled to that run if he had lived; he worked hard for it. He was away from home a good deal of the time, when he was away from home I guess he had to pay his own expenses, and they came out of what he earned from the railroad company, in other words, his own living expenses. I always bought his clothing myself, it, of course, came out of his money. He had $3000 insurance; I got that. He owned some property in Temple; we had our home; I owe a little bit on it. I have had

some improvements made on the place since his death; that is what I owe for, part of it. My oldest daughter has been married
81 four years. Her husband supports her.

Redirect examination.

By Mr. CURTIS:

At the time of his death Mr. McGinnis had only made one month and a trip and a half on that run and that run was given to him, and he was old enough to hold it in seniority. For twenty years' service he was given this run. The month that he ran on this check now shown me his check appears to be $220 for that month.

The defendant thereupon introduced in evidence the following pay checks of Engineer W. T. McGinnis, showing the amounts evidenced thereon:

November, 1908	$94.26
December, 1908	132.61
January, 1909	163.79
February, 1909	184.27
March, 1909	201.99
April, 1909	81.10
May, 1909	213.79
June, 1909	111.51
July, 1909	81.10
August, 1909	138.59
September, 1909	220.03
October, 1909	21.08

That is the month he was killed.

Whereupon plaintiff rested.

Agreement.

It is agreed that Mrs. Mary J. McGinnis is the permanent
82 administratrix of the estate of W. T. McGinnis, deceased, duly appointed by the County Court of Bell County, and that letters of administration have been issued to her.

It is also agreed that train Number Seventeen, which is the one that Mr. McGinnis was on as engineer at the time of his death, contained cars, passengers, baggage, express and mail that had originated at points outside of the State of Texas, and that were destined to points within and beyond the State of Texas, and also that the train contained passengers and express that had originated at points within the State of Texas and destined to points within the State of Texas; that some of the cars in that train had originated at Kansas City, Missouri destined for Galveston, Texas, some of them had originated at St. Louis, destined for Galveston, Texas, some of them had originated at Cleburne, Texas, destined for Galveston, Texas, and that the deceased took the engine at Cleburne and was to have released it at Bellville, within the State of Texas.

E. H. HARRIS called as a witness on behalf of the defendant, being duly sworn to tell the truth, the whole truth and nothing but the truth testified as follows:

I live in Galveston. I am a passenger conductor in the service of the Santa Fe. I have been in that service as passenger conductor something over two years—that is, regularly. I have been handling passenger trains in extra service for the past ten years. I have been in the service of the Santa Fe since February 10, 1893, in the capacity of brakeman, passenger conductor and freight conductor.

I recall the circumstances of the wreck of the passenger train at Silenus on October 5, 1909. I was the conductor in charge of that train; I had taken charge of the train at Cleburne, Texas.

83 The train that I took there was just the train that had originated at other places and that was just the starting point of my run. I will refer to my record to see how many cars we had. We had ten cars. We were a little bit late leaving Temple that night. If I remember correctly, our time to leave there at that time was 1:15. However, I am not positive—there might have been a slight change in the schedule but we left there at 1:35—that would be twenty minutes late. It is about three miles from Temple down there to the north switch at Silenus. The character of the track there was very good—first class track. I had engine No. 1296 that night. I am familiar with the track and all these stations along there at Silenus. That is a straight track there—it is in the prairie, in the open prairie country. The lay of the land right at Silenus is level. There is no cut or fill along at this switch. There is a slight fill there—just enough to raise the track above the surrounding country.

I don't know exactly how fast the schedule of No. Seventeen was to run at that time but I think it is between twenty-eight and thirty miles an hour—that is the schedule. That includes stops. It actually runs about sixty miles an hour between stations. When I first discovered that something was wrong, I was in the first coach, which is the second car from the engine, the mail and baggage car being one car ahead and the smoker followed that and I was in about the center of what we call the negro compartment. The first thing that attracted my attention was the motion and the starting and jerking of the train and the escape of the steam. I was standing up at the time and just as soon as my attention was attracted that there was something wrong, I turned around and faced the forward end of the car and called out to the passengers to brace themselves. I did not want anybody to get up and did not want them to be in position where they would likely be thrown. I think there was six of the cars that were derailed that night—the first six cars. Now, I want to correct a statement I made a while ago—I said we had

84 ten cars out of [illegible]ple at the time of the accident—we had ten cars out of C[illegible]burne but we only had nine at the time of the accident because we left one at Temple. We left the San Angelo sleeper there, so out of Temple we only had nine. When I say there was six cars derailed, I mean that they were off of the rails. They were not turned over, just off of the track. The three rear cars remained on the track and on good railing. I

went back to the rear end of the train. The rear end of the train was three car lengths, as near as I can remember now from that switch stand. My recollection is that the switch was just at the forward end of the third car from the rear of the train. That is as near as I can recollect it now. I made an examination of the track or switch that night, within a few minutes after the accident.

That is the switch stand there. I have seen that switch stand before. I recognize this switch stand as being the one at the point of the wreck to the extent that the lug is gone. Of course, they are all alike. This switch stand now is in the same condition that the switch stand I examined at the point of the wreck was immediately after the wreck. This rod that is connected at the base of the switch stand is generally known as the pitman bar or bridle rod or throw rod. They use various terms. This pitman rod was not connected at the stand at the time I examined it. When I examined it after the wreck the rod was lying alongside of the track At this point here (indicating) this bridle rod is connected with the connections that hold the two switch points together. It operates the switch in only one position here. When you want to throw the switch, you raise the lever. The switch now would be set for the side track. The lights up here show red with the switch thrown for the side track. That is a danger signal. The track is lined up for the side track. After throwing it, it ought to have been in that shape that night, showing the green light there. With this switch lined up for the main line, the right rail, that is the right hand switch point, would be up against the main rail, the left hand point
85 would be about five inches away from it.

This one that is lined this way shows the track lined as it ought to be. It shows the switch point on the right hand rail going south close up to the main line rail. The switch point on the left hand side is open about five inches. I have no impression of the lights that night immediately after the wreck. When I looked at the switch stand that night, the track, I remember very distinctly, was as it is now—set for the main line, but as to whether the light was burning bright or dim, or at all, I don't remember It would not be possible for the lights to show a clear track and the switch not show the same signal unless the light had been tampered with. If it was in the proper condition, it could not show anything else. You can't put that light on wrong. It is so fixed that you are bound to put it on there right. I would call that the end of the switch stand—I don't know exactly what the proper term is. That is so constructed that there are two long spikes together and two short spikes together, so that either way you put that on there, it will show a green light when the switch is set for the main line in other words, you put it on there that way, and this will show a green light and the only way to show a red light is to throw the switch or set the lamp on one prong there It would not be secure there.

When I got down to this switch stand that night, this bridle rod or pitman rod lay in this position (indicating) and that rod, in that shape, with the nut gone, would not have anything to do with the track. You can throw this thing all day long and it would not

affect the track any way. These lugs there hold this pitman rod in position on the switch stand—there are two lugs—one here and the other one here. There one was gone. It is gone now. This break here on the bolt was new. I call this a lug. There should be another lug on the other side of this switch rod, just like this is here now. That lug is fastened with a bolt that goes down through the bottom of the switch stand into the tie. That lug shown me
86 has been bent—badly bent. That lug ought to be fastened on there with a bolt and the end of the nut run out practically over the end of the bridle rod like this one does. This one was gone. The switch stand also showed that it had been sheared, that something had come up there with considerable force. That was all new. This lug was gone and there was a sheared place there. I do not know where the lug was afterwards found. I don't know that it was over three or four or five minutes after the train came to a stop until I got back to this switch and discovered the condition of it. As soon as the train stopped I got out onto the ground and walked towards the head end. I did that for the purpose of seeing what was the matter and to try to see if I could locate the engine men, the engineer and fireman, but the engine was so enveloped in steam and I started back and met my flagman and explained to him the conditions as best I could and told him to get back to Temple as soon as he could.

This large piece of wood on which this switch stand rests was just an extension of one of the ties under the track. It has been sawed off to bring into the courthouse. That is the longest cross tie that we use. It is what is known as the head block. This switch is set the length of this pitman rod outside of the left hand main rail going south.

I examined the switch points and cross-over track. The switch points were all right and the connection, as far as I could find from an examination that I made, the switch point on the right side showed that something had scraped along the edge of it, leaving a new surface—it wasn't damaged or anything of that kind but it showed that something had scraped along there, probably a rod, or something like that. The switch itself was partially thrown at the time I saw it. The right hand switch point, as near as I can judge, was probably one-half an inch or so from the main line rail. It wasn't up close against the rail.

This switch point right here on this picture, the one on
87 the right hand side, was thrown about half an inch. With that thrown, it could derail a train. The one that ought to have been closed was pulled out so that the engine, instead of going down the track, would split the switch. If this pitman rod had been connected with the switch stand and the switch showing for the main line, that switch point would not have been in the shape it is now, but would have been closed like this (indicating).

Cross-examination.

By Mr. CURTIS:

I stated that I was the conductor on the train on which Mr. McGinnis was in charge as engineer the night he was killed. I judge that we were running about sixty miles an hour when we reached Silenus switch; I judge that from the way we were running along and the way we usually ran. We were going along just as we usually did. That was not an excessive rate of speed. It was the usual and customary speed at which we ran. I had just started taking up the tickets after leaving Temple a few minutes before the wreck occurred. That is my first duty, unless something interferes, to go through the train and take up tickets. We left Temple at 1:25 and the wreck occurred about 1:40 It is about three or three and a half miles from Temple to Silenus. My attention was not attracted nor was there any occasion for me to notice the condition of the switch light at Silenus as I approached it. I had no warning or indication of danger until after the wreck, until after the accident occurred. The train stopped very suddenly. Three of the coaches had not passed over the switch. I could tell the switch the train had split or gone into. That was the switch at which this stand was located. That is not the north switch at Silenus—that is what we call the north middle switch. There is another switch at the extreme north end. We had already passed over one switch. This was the cross over switch. I could see where the switch was open and the train had gone into it. As to it being the duty of the engineer or conductor to inspect switches, that is a matter that is
88 governed entirely by the position of the switch, track, etc. The conductor is kept back in the train and he is not in a position to observe these things as he approaches, unless something would call his attention to it. It is not a part of his duties to inspect the tracks or switches other than as it appears to him as he is passing over the track unless he has reason to believe there is something wrong with it. At this switch the pitman rod was off at that point there, disconnected right there, and this lug was gone and the switch was open for about an inch, something like that, a half inch or something like that. It was open sufficiently—it didn't have to be closed for the flange to go over it. If the wheel hugged the rail close it probably would split the switch. The fact that the train was derailed indicated that it had split the switch—that the switch was open. This pitman rod is attached to and connected with the switch points. When the switch is set for the main line track, the switch stand being on the left hand side going south, the pitman rod would be extended furtherest towards the court—that is, it would be moving furtherest to this point, in setting it for the main line That would depend a great deal on the position of the switch stand—the way it was set of course. Taking into consideration the manner in which this switch was set, the pitman rod would extend further that way from the switch stand in setting it for the main line, at that particular switch, because it had to bring the right hand rail, the furtherest from the switch stand, up against the main rail, so if it was set for the main line and the lever was worked so as to set

it for the switch, the pitman rod would be drawn back towards the stand, under the second lug furtherest from the stand. In adjusting that switch stand and in placing it there, it was supposed to be adjusted so that when the points were set for the main line, that the switch point would have to be close to the right rail, so that
89 the switch point, fitting up there sharp against the right hand rail, about the same width and size as if it were one solid rail. The switch points would taper it off to such an extent that there is not any point there to offer any obstruction or but very little difference in the rail at that point and any other point on the line. The flange of the wheels of the train and the engine fits on the inside of the rail. The flange on the right wheels fits on the inside of the right hand rail and the flange of the left wheels fits on the inside of the left hand rail to hold it on the track. If the flange of a wheel were to strike the defective point and that point were crumbled and worn away, forming a shoulder for the flange to extend up on, there would be no danger of splitting the switch. It might mount the rail but it would not split it It might ride upon it. If it was to ride upon it, it might derail it. That is the reason and the necessity for proper switch points—to reduce the risk and danger. If the switch point did not fit up against the rail, it might possibly cause the wheels or a flange to split it. That particular flange or any flange in that train should be hugging the rail. If the switch point was worn away so it did not fit up closely to the main line rail and the flange would go into that, it might possibly cause some risk and danger of a derailment—if it was worn away and did not fit up close to the rail. I have seen split switches. Moving a car through a switch that is set against you causes split switches. It is called running through a switch. That is what is generally called, in railroad language, "splitting a switch." Running through a switch is going through it when it is set aginst you. Running through a switch might leave it open and then another train going in the opposite direction, might split it. If a switch point is perfect, with no defect, and fits up closely to the rail, there is absolutely no danger of a train splitting it. It is considered solid rail.

I did not see anything of the lug around there. I looked for it in the immediate vicinity of the switch stand but I never
90 could locate it. This was the morning of the 6th. I left Cleburne on the night of the 5th, that put me by Temple on the morning of the 6th. Mr. Greer was the fireman on that train. I did not see him immediately after the train stopped; it was sometime afterwards, probably fifteen or twenty minutes. I couldn't find him when I looked for him but I afterwards did find him in the car. I don't know whether he was on the engine when it turned over. That is where he belonged. I presume he was. He was there when he left Temple. I don't know whether he jumped off or not. None of the passengers were seriously injured.

W. G. MASSENBURG, called as a witness on behalf of the defendant, being first duly sworn to tell the truth, the whole truth and nothing but the truth, examined in chief by Mr. Culwell, testified as follows:

In October of 1909, I occupied the position of division engineer

of the Santa Fe on the Beaumont Division. I was on train No. 218 going north at the time of the Silenus wreck and we reached that point a short while after the wreck. I got to the wreck some time between two and three o'clock in the morning. When I got there, I examined the track to see, if possible, what caused the wreck. I made an examination of the switch and the switch stand. I found the switch was slightly cocked and the pitman rod was disconnected from the switch stand and the lug on the stand, which is supposed to hold the pitman rod in place, was missing. I saw that the rivet had been broken off that held the lug. That which you hold in your hand is what we call the lug. That lug is not in its proper shape; it is bent. The proper shape of the lug is that this piece that is pointed in should be turned down, more like that other one is. This lug should be in the same shape as the one that is fastened on—they should be in the same shape. They are both fastened to the switch stand in the same way by some kind of a nut or bolt, this same fastening as on the one that is in place. I examined the nut or rivet and it was a fresh break, clean,
91 white metal, indicating that it had been recently broken. With that lug securely fastened in its proper position, it is not possible to remove that pitman rod or, rather, disconnect it from the switch; in other words, before that pitman rod could be disconnected, you would have to remove the lug and that lug was removed. No possible pressure that would come to it would be transmitted under that pitman bar, which is horizontal. This switch stand is about seven feet from the nearest rail. This pitman rod is just about six feet long and the bridle rod comes out about a foot from the rail. The bridle rod is the connection between the grade rail and this rod that is shown in the picture is the pitman rod. The rod that is fastened onto the bridle rod and extends along the track—under the track, is called the bridle rod or sometimes it is referred to as the throw rod and the bridle rod is referred to as the head rod.

The lights were burning in the switch. They showed a green light. That indicated a clear track. There was a wreck on the track. The lights of the switch stand and the switch track showed that the switch was set for the main line and the pitman rod was disconnected and the switch was partly cocked. I examined the switch point. I have seen the switch points that are down in the courthouse yard. I cannot identify them positively but to all appearances that is the same set.

(At the request of the defendant, at this point the jury was permitted to go down into the court yard and examine the switch points.)

This track is setting the same way that the track is at that place. The side track being on the south, this switch point here would have to be cocked to wreck a south-bound train and this other rail did not have anything to do with the wrecking of the south-bound train. This would have to be about five inches from the main line rail. This one don't have anything to do with it, with the
92 wrecking of a train. This one here was about an inch or possibly an inch and a quarter from the rail. From an ex-

amination of the switch point, it looks like a good point, and not a defective point. From an examination of it for twelve inches, it appears to be perfectly straight. The rod under here is what you call the bridle rod. That switch stand that is up stairs is fitted in here and by means of a lever that is attached to the switch stand, you can throw the switch. That is a guard rail on the inside and if they didn't throw together, you would have to bend this rail. When that switch is set, it would be a part of the main line. This rail on this side is supposed to fit up close. The flange of the wheel runs on the inside of the rail. A car, coming in contact with the rail—coming along here, would not strike that switch at all if this point fitted up close. That switch was cocked—if the switch was cocked, this would not go on the inside. This piece of cross tie has been sawed off. That is what is usually known as the head block and is the main line tie extended to the switch stand. It is shown on picture No. 4 to be a long tie that has been sawed off.

It is not possible to put that light on the top of the switch stand wrong—the light is made to fit only one way and you can't put it on any other way. The only way you can possible put that light on so that the light will show red and the track a clear track at the same time, would be to have somebody make another light with a different lens, putting the red light where the green is supposed to be in the lantern. You can't use that light as it is without some changes to make it show correctly. The damage that I found there is to this switch stand—the lug off and the bolt broken that held it in place—could not have been occasioned just by reason of a train splitting that switch. I was not there when that lug was found. The switch lever was in the socket and the switch lock was locked. That was in its proper position for the clear track.

93 Cross-examination.

By Mr. CURTIS:

I spell by name M-a-s-s-e-n-b-u-r-g. It is not a matter without much difficulty to break a switch lug. If you will notice the number of rivets that go through it—it is a matter of difficulty and long experience has proved that a lug like that is very hard to break. Sometimes they break the switch stand and sometimes they break the lug, I guess. I suppose that all railroad men know that you can take a hammer or bar and break a lug. A person could take a hammer or a bar and break a lug, if they wanted to interfere with the switch; then they could take this switch light off and set it up on one of these and wire it so it would appear that with a green light—you could set it on one and swing it and wire it there but when we examined the switch we did not find any wire there. Anything could be done. There would be a good many conditions governing that, the ability of a man to climb up there.—This light wasn't out; it hadn't received sufficient concussion or shock or jar to put it out; it was still burning in its proper place for a clear track.

I said it was between two and three o'clock in the morning when I reached Silenus. I was asleep when the train stopped and then I

awoke and got out. It was just after I got out that I first noticed the switch point and the pitman rod disconnected. I am not sure whether that was two or three o'clock—I didn't look to see what time it was; it was some time after the accident happened, probably an hour. I don't know what had been done to the switch during that time, if anything. I was not there when Mr. Harris examined that switch point and noticed the bend in it and the abrasion all along on the inside of it. I did not find any such condition as that on this point down there. I don't know what conditions the conductor found there. I found a little piece broken on the inside of the point. I examined it at night and I can't say as to
94 whether it was old and rusty or a new abrasion at the time I saw it, whether there were any indications of rust on it, or not, because I did not examine it that close at that particular time. That little abrasion on that point might have been struck that night. I never saw one that went through a wreck look as good as that. I don't think that train was going sixty miles an hour. I was judging from the rate of the train which is only about twenty-eight miles an hour and sixty with the stops is too much. If the conductor says sixty I would not say that he is mistaken; I am giving you a personal opinion.

If this lug was off and if the pitman rod was disconnected and the switch was partly opened, then the train going through it, going south, splitting the switch, would not have any occasion to bend the point, they could move the point without bending it, if the pitman rod was disconnected, so if the switch point was bent, it would be an indication that it had been struck and that there was—there would not necessarily be some resistance holding it; its own weight would be resistance enough to indicate that it had been struck.

I came into Temple that night when the train came in; I don't remember just what time that was. I haven't stopped at Silenus since then, haven't been there since. That is all I noticed there that night, that the pitman rod was disconnected when I inspected it. I suppose it was before three o'clock. I don't know when No. 218 got there. I was asleep when the train stopped but I got up. I was dressed. I was riding in the Pullman and was going to get off at Temple, in fact, I got ready to get off and was lying down in the berth. I was still lying down in the berth when the train reached Silenus.

I did not see Engineer McGinnis there; didn't pay any attention to him, didn't look for him. I was told that they had all been well cared for and the Pullman man said they had furnished some blankets and things to take care of them with.

95 I crawled under the car, under the rear end of the last sleeper. I had some matches and paper with me. I examined only one switch at that point before I found the one where the train ran off. There are four of five or maybe six switches at that point, but a man that is accustomed to wrecks will know where to look for them. The reason I examined the switch points was that I found them in going back to the rear end of the train. I found the switch points and the switch there in going back to the front of the car where I stopped, which was off of the track and the

rear of the car was on the track, and that was the reason that there was—that I knew there was something between that that caused the derailment. When I stopped and found that, I was on the opposite side of the switch stand. A train would not necessarily be more likely to derail at a switch than at any other point, somebody might have ditched it, put an obstruction on the track. If you want me to say there is more or less risk in the track on account of the switches, I will say there is. I did not find where the track was broken. I found where the track was broken down in the wreck ahead of the switch, that is, south of the switch; that was by the engine and the train striking it. The switch showed a clear track for the main line. The points were cocked. That is partly open; it was open about an inch or an inch and a quarter. In changing the switch from an open main line track to set it for the side track, the pitman rod moves just the same amount that the point shoves, about five inches on that eighty-five pound rail, so if a man were to disconnect the pitman rod to open it, he could open it as much as five inches—to make the full throw of the switch he could throw it from the main line to the passing track. After it gets past an inch, it is my opinion that it would do as much damage as if open two or three or more inches. This was open about an inch and a quarter. I did not measure. If it was only open one-quarter or three-eighths or one-half an inch, it would not be as likely
96 to wreck a train as if open two or three inches. If a person intentionally wanted to set that switch and had the pitman rod disconnected, it would be just as easy to open it two or three inches only be would have to pull just a little bit longer to open it three inches than a half inch. If he was a good strong man, it probably would not make any difference with him.

Redirect examination.

By Judge CULWELL:

All that is necessary to cause a derailment is to throw that switch so that the flange of the wheel will catch in between the point and the main line rail; that will produce a derailment. If a half inch will cause that flange to go in there, a half inch is enough, if it will take a half inch. The flange on the wheels on one of these twelve hundred class engines is about an inch and a quarter wide.

J. S. SNYDER, called as a witness on behalf of the defendant being first duly sworn to tell the truth, the whole truth and nothing but the truth, examined in chief by Mr. Culwell, testified as follows:

I live in Fort Worth. My occupation in October, 1909, was working for the Santa Fe on the fence gang. I had occasion to go over the track on the afternoon of October 5th, 1909, going south out of Temple. I went on a hand car. I passed over the switches at Silenus and they were all right to keep a hand car from jumping off. I don't know the condition of the switches. I know where that switch was located where the train went into the ditch that night. I went over that switch in the afternoon on a hand car. I could go over it all right. If that switch had been cocked enough to

have derailed a train, it would have derailed my hand car
97 and it didn't derail my hand car. That was about 4:30 or 5 o'clock in the afternoon. I was going to Heidenheimer. I met somebody on the way. I don't know who it was; they were strangers to me. They were two men. I met them something like half way between this switch and the station of Heidenheimer. They were afoot and were going north towards Temple. One of them was dressed in a spotted suit of overalls. I didn't pay any particular attention. We was going about four miles an hour and I just glanced at the first man, at the man on the right hand side as we passed him—I just looked him in the face as we passed him, and the other fellow was a short fellow—I didn't pay any attention to him. One of them was carrying something that looked like a shoe box.

Cross-examination.

By Mr. PIERCE:

I was going from Temple to Heidenheimer. It was something like 4 or 5 o'clock. My foreman was with me; his name is J. L. Evans. The other men were J. B. McKenzie and the last I heard of him he was out close to Brady; M. F. Shumate, who is in Fort Worth now; B. J. Wall, who is in Fort Worth, and a fellow named R. C. Pringman. The last I heard of him he was at a little station this side of Cleburne. That is six, all told, I believe. We were going from Temple to Heidenheimer about 4 or 5 o'clock in the afternoon. I don't think we met anybody between Temple and Silenus; I don't remember. I remember meeting these other two men but I don't remember meeting anybody else unless it was a track walker. I don't know whether we met anybody after we passed these other two going to Heidenheimer. I did not say anything to these men. I did not stop; they did not stop. There was nothing unusual in it for me to see a man walking up the railroad track. It was not unusual to see a man with a shoe box in his hand.

I first made a statement about this at Boliver Point, after we got to Galveston. I don't know how long that was after this
98 accident; I don't know whether it was a month or two weeks or six weeks, but I don't think it was over two weeks but I don't remember. I haven't any idea at all about the length of time it was. I don't know as you would call it a statement—I talked about it at Boliver Point sometime after this accident. I talked about it to Mr. Ed Miller. He asked if we met anybody and then asked who we met. He did not ask me if they had a shoe box; he didn't tell me that. As to whether I testified at the last trial that Mr. Miller was the first man that reminded me that this man had a bundle under his arm, Mr. Curtis asked me that question and would not let me answer. As to whether the stenographer made a mistake in the question: "He is the first man that reminded you that he had a bundle under his arm?" I will say that I answered "Yes" according to that question. How did he know that he had a bundle under his arm? It had been two weeks after I passed this switch.

I told Mr. Miller that I remembered these two men without anything particularly about them to cause me to remember them except on account of the way the foreman of the gang spoke to one of the men. He says: "Hello, J. L." That is what made me remember it. I did not testify that before. I don't remember that I testified before that there was nothing to call my special attention to it or make me remember it. J. L. was as J. L. Evans. I didn't testify to that before. I don't think I was called on to state whether I remembered anything unusual. There was nothing unusual that had happened—it wasn't unusual for Mr. Evans to be spoken to We went to Galveston the next day. That afternoon we went to Heidenheimer and loaded our tools and got ready for this extra; we got out on an extra; I reckon it was an extra. When we went over this track at Silenus, we didn't stop. We were going at a pretty good gait. I did not see anybody around there. If there had been anybody around there I suppose I would have noticed it. I did not examine the switch track or the switch points. The light was not burning, not at that time.

99 L. W. MUELLER, called as a witness on behalf of the defendant, being first duly sworn to tell the truth, the whole truth and nothing but the truth, examined in chief by Judge Culwell, testified as follows:

I am a fireman for the Santa Fe. I was firing for the Company in October, 1909. I remember about this wreck of Number Seventeen at Silenus. I know where that switch was located there. I went south over that switch that afternoon; I don't recall the exact time but it was somewheres between 4:30 and 5:30—I don't recall the exact time. I went south on an extra freight train. I was going in the same direction as the train that was afterwards wrecked. I passed this switch. We had no trouble with it; it was apparently all right. If the switch had been cocked at the time that I went over it, it most assuredly would have wrecked that train, but we did not have any trouble there; we didn't stop there. We didn't go in the ditch. My engineer was Tom Orman. I think he is here; I saw him a while ago. There was nothing about that switch at the time that I went over it that called my attention to its being out of order in any way. I believe I had engine 765 or 764—765. That was late in the afternoon of October 5th.

Cross-examination.

By Mr. CURTIS:

I have run over the road a good part of my time in the service of the Company, that is, I am a good part of my time on my run. My attention was first called to the occasion of my having been over this track on the afternoon of the 5th of October sometime shortly after breakfast the next morning. I heard about the wreck. We don't keep any record showing the time that we made and each station and the trains that we passed. The engine men don't and the train crew don't either. That is kept in the office. There is no member of our train crew running south, for instance, and passing a north

bound train at Cameron and another at Milano and another
100 at Bellville, having a record of the trains which we passed going north unless there was some delay or a delay report. I don't know what other trains passed over that track going north or south on the afternoon of October 5th and night of October 5th. That hasn't anything to do with my part of the business and therefore I kept no record of it. I don't recall, personally, whether we met any trains going north that afternoon or not; we hardly ever go out that we don't pass some somewhere but I don't recall. As a matter of fact, freight trains are frequently passing over that track going in either direction. In a busy time like October we would have more freight trains passing than passenger trains; we do that most of the time. There are more freight trains than passenger trains. Silenus is frequently used for trains to take the side track for the passage of other trains; that is what it is there for. We have a number of sidings with six switches like Silenus between Temple and Galveston. There is no such place as Silenus between Rogers and Heidenheimer. I know one that we call Arion, that is like it; same kind of a place exactly, about 4 or 5 miles or 6 or 7 miles this side of Milano. It is exactly the same kind of a station. No station there—it is just exactly the same kind, same as Silenus, with six switches. I don't believe there is another one between these and Galveston. I don't know anything about the first division. I don't work down there. Temple is a division point of the road. These are the only two on that division that have that number of switches that are not in towns. These are the only ones that I know of on that division that are between stations, between Bellville and Temple. Milano is the junction point with the I. & G. N. and Temple is a freight division point. I believe they call it. Silenus is frequently used for the passing of trains; that is the only motive they had in putting it in there. That is what it is made for. In order for Silenus to be used for the passing of trains, one train
101 must assuredly has to take the side track, then in order for it to get back on the main line track it has to pass through the switches. That is the only practical way for it to get back onto the main line track. If a train were pulled through that switch without throwing it, it would leave it in a defective, dangerous condition. In this particular switch, if a man would back out or head out of this switch, he would have to be moving northward to damage that switch. If that were done, that would leave it so that a train coming south would be likely to split the switch; it surely would not go up there at a high rate of speed. I don't know how many trains or switches side tracked there on the afternoon or night of October 5th. I have no record of them.

Redirect examination.

By Judge CULWELL:

Between Temple and Cleburne we have one intermediate station such as Silenus at Felton. It is not exactly built like that but there is six switches. We have one at Manhattan. That is the only one that is built exactly like that. Felton is about three or four miles

north of Temple, and that one is not built exactly like this other one, either. That is not used in connection with the switch yards. It is used for a passing track for the passing of trains on the other side of Temple, on the north side of Temple. It is put in there for the meeting and passing of trains. I don't know whether, under the regulations of the Railroad Commission, it is necessary for us to maintain points like that for the meeting of trains. Manhattan is about half-way between Cleburne and Valley Mills. There is one other track like that this side of Cleburne about four or five miles, not built in the same way. These other two places are the only two places of that character between Temple and Cleburne—built in the same way, between towns. There are some at regular stations having a regular station agent. At some places we have a station agent. At places like Pendletonville, Moody and McGregor we have station agents.

102 TOM ORMON called as a witness on behalf of the defendant being first duly sworn to tell the truth, the whole truth and nothing but the truth, examined in chief by Mr. Culwell, testified as follows:

I am an engineer in the service of the Santa Fe. I recall the wreck of Number Seventeen at Silenus. I went south over that track on the afternoon of October 5th, the afternoon before the wreck. I was called to report at 4:20 but I do not know just what time I got out of Temple. We had some delay in the yards but I don't know what it was. I believe I was fully as late as five o'clock getting out. I passed over the switch that was in trouble that night. It was all right as far as I know. If it had been cocked I couldn't have gone over it. It would have wrecked my train. The condition of the track along there was good as far as I remember. I do not remember any track orders over it. The switch lights were not lit at that time of the day—that is, I don't think they were. I don't remember about it. I have been an engineer for the Santa Fe about nine years. It is not a usual and customary thing on the Santa Fe if the weather conditions are good and the track is all right, to have track walkers at night walking the track. Locomotive engineers know that, under normal conditions, there will — no inspection of the tracks and switches at night. As an engineer, I would say that the railroad does not, in normal conditions, have the switches and tracks and so on inspected at night—not unless they have been doing some work and they think it is necessary to have someone watch them. The track was in good condition at the time of the Silenus wreck. It is a fact that when I went over that track that afternoon, I knew that with conditions normal, that that switch would not be inspected in the night time. I knew that section men quit work there at six o'clock in the afternoon. That is a rule unless they are detained to finish up some work. If there was a heavy rain fall and there were bridges and culverts that would be likely to overflow, that is an occasion when they send me
103 out to watch these dangerous places. I have no recollection of anything surrounding this switch that afternoon to indicate to me that it was in an unsafe condition.

Mr. McGinnis was an old engineer in the service. I was well acquainted with him. I fired for him for quite a while, ran on the same engine with him. Mr. McGinnis was familiar with the rules of the company, what I would consider familiar with them. He was a practical railroad man.

Cross-examination.

By Mr. CURTIS:

We have no one at Temple or any particular point who sees to the safe condition of the yards and tracks—we have employees passing over it whose duty it is to see and report if anything is wrong—we all do that. At a place like Temple we have no particular inspection of the track but if there was anything wrong, we report it. That isn't our only duty, but it is done. At stations where we have agents and where we have switches, the station agent is usually out and about the depot and around the yards about the time and before and after the passing of trains, and at these places the station agent, in connection with the other man who pass- over the track, including the section men, are responsible and it is their duty to report anything wrong but we have not any inspector at the places like this. I am familiar with the rules of my company just like Mr. McGinnis was. I don't mean that I am familiar with the duties of the train dispatcher, or the yard master, or the general manager or the vice president or the master mechanic or the section boss; I am just familiar with the rules so far as they pertain to my duties or the duties of a train crew in operation—the duties of a fireman or an engineer. I would not testify on my oath that Mr. McGinnis was familiar with the duties of other employees in their departments, not all of them. As a matter of fact,
I could not testify that Mr. McGinnis was familiar with mat-
104 ters outside of his own duties as a competent engineer. It
was not any part of his duties to inspect the switches or yards. He had a right to presume that that had been attended to by other parties.

H. E. HOLMES called as a witness on behalf of the defendant, being duly sworn to tell the truth, the whole truth, and nothing but the truth, examined in chief by Mr. Culwell, testified as follows:

I am an engineer in the service of the Santa Fe. I remember the time that Number Seventeen was wrecked at Silenus. I was just getting up at that time. I went down there. I got there about two o'clock A. M. I made an inspection around there; examined the switch stand and it was in proper condition. It was just like it is now, showing for the main line. The target and light showed a clear track. That indicated that the switches were set for the main line. There was something broken or off around that switch stand; there was a lug gone. By a lug I mean that piece of iron over on the other side there. That lug which you hold in your hand was gone. The purpose of this lug when it is in its proper position is to hold that rod on—that pitman rod. The pitman rod was not connected with the switch when I got there. It was disconnected.

Throwing the lever then, with the pitman rod disconnected, did not have any control at all over the track.

I got down and made a careful inspection around this switch. I did not smell anything. I seen a grayish color there on the stand. That grayish color was not the natural color that ought to be there. I don't know whether it was powder stain or dynamite stain but it was the color of a powder stain after it had been exploded. It was a powder color. I don't remember now how long that was after the wreck occurred at 1:40 in the morning. It was sometime after when I examined it, somewhere around about daylight, think. I
105 noticed the grayish color on it. I was down there when that lug was found. It was found in a direction off from the switch stand like towards that door there—in a field about two hundred and some odd feet. It was some two hundred odd feet over in a field. I fitted it back in its place myself. It fit on there all right. There was a grayish color on that lug to indicate powder stains and then there was a kind of a scar on it. From an examination of this lug, I will say that that is the same scar. I got that lug from Mr. Maxon, took it out of Mr. Maxon's hands and fitted it on there. I was there when it was found. The lug was found by a negro man. There was considerable effort made to find it before that. There was quite a crowd looking for it. I can't really say how many men but there was a good many. I don't remember the distance that that lug was found from the switch stand. I don't know Mr. Griffin, the division engineer, at all. I examined the switch points. I have seen those switch points down in the yard. I think they are the same ones. I think that is the same set of switch points down there in the yard and that they are in the same condition that these points that were in that track on the night before the wreck—I think they are the same ones.

Cross-examination.

By Mr. PEARCE:

These points was not hurt at all in the wreck. I never noticed any others—never paid any attention to them. I paid attention to these.

I have been railroading about nine years with the Santa Fe. I have seen split switches before—have gone over switches in yards. I have seen wrecks before and derailed trains. I have seen them in as good condition as this. I remember noticing that now. When a train was derailed at a switch point, I remember having seen them in good condition. I don't know when that was but it was right here on the Santa Fe—it was less than ten years ago—less
106 than five years ago—it was south of here on the Santa Fe. You would know as much as I do if I told you how far south.

Those gray spots on the stand were in here. The gray spots on this side were right in there. I will say that the gray color that I saw was right up here, from here to here (indicating); from here to there would be about five inches; five inches of the gray space or grayish color. This lug was gray—the underside and the top side, both. It was gray on this side and this one. I don't know whether there was any gray on the base. I just saw the grayish part

on the top and bottom of this part. I did not see any gray on the bridle rod anywhere; I didn't pay any attention to it. I can't say there was any gray on this place here. I did not notice it. I was paying attention to it. I did not see any here; I can't say that it was. This bridle rod fits back this way. This being north towards Temple, this lug was found about two hundred feet in a field at an angle towards that (indicating) it is the way you are pointing. I don't know in what direction that is, whether it is a little south by east, anyhow, it is in that direction (indicating). Here is the switch and the lug was right out in the field—right out here.

J. R. MATHIS called as a witness on behalf of the defendant, being first duly sworn to tell the truth, the whole truth and nothing but the truth, examined in chief by Judge Furman, testified as follows:

My name is J. R. Mathis. I live about three miles south of Temple near Silenus Switch. I call it three miles from Temple. The switch where this accident happened is about four or five hundred yards from where I live. I live east of the switch, my house is east of the switch.

I remember the occurence of a wreck at Silenus in which the engineer, Mr. McGinnis, lost his life. On the evening of
107 the day before this wreck happened at night, I was picking cotton. I quit a little before sundown, is my recollection, and went to the house and commenced feeding. I was on the east side of my house then—the house was between me and the switch. I was feeding the stock. It was about sundown. My attention was attracted by something unusual—there was a large report of some kind that drew my attention. I have heard both guns and dynamite; have heard dynamite go off and have heard guns go off. It seemed to me if that was a gun it was the largest gun I ever heard It was a kind of a muffled sound. I did not have time to pay much attention to that at the time because the stock got scared at it and I didn't pay much attention to tell whether it was a gun shot or a blast. I could not tell what direction that sound came from because I was stooped over shucking an ear of corn out of a basket and I couldn't hear. I was too close to the house. I didn't hear anything more that night that attracted my attention. This was about dark. My attention was not attracted again that night or the next morning towards that sound that I had heard. I don't think the fact that there had been a blast or an explosion there occurred to me any more then when I went to the house my wife spoke to me of a big report.

I could see the accident from my house. It was some time the next morning. I reckon about sunup, when I first saw it. I saw there had been an accident down there; I seen there was something the matter with the train down there. I went down to the place probably about sunup—I don't recollect now exactly what time. There were some people at the switch when I went there. They said that the switch was tore up. I didn't understand the switch. I found there had been an accident there, the railroad was all torn up. The engine was on one side, and the track was all torn up

where we had to step across. I didn't notice the switch as I passed down. I was looking at the cars. I afterwards came back up there and looked at the switchstand. My recollection is that this
108 rod that runs out here was off. I think it was off and lying out in that way. There was a piece missing from the switchstand. I don't remember seeing that piece at that time. I think that rod was off at the time—that is my recollection. There was a broken bolt. I don't know whether I could tell the jury where it was, but I think this is the bolt there. At that time that appeared to be a fresh break. I think this is the bolt that was broken.

My eyesight is bad, but some of the men said right there it looked like there had been something burned. I seen something there that looked as though something might have been burned. I have seen the effect of an explosion of dynamite on iron. As I told you, my eyesight is bad, and I could just discern that different color. It was discolored; it looked to me as though there had been a flash or something burned. Several of us went down there together; my boys went with me. My boys are here; there are four of them.

Cross-examination.

By Mr. CURTIS:

I stated that on the afternoon of the 5th of October I heard some kind of a report of a gun or some explosive—I don't know whether that was a gun or an explosive. It was about dark when I heard that. I can't tell you whether it was before or after seven o'clock. It was what I would call good and dark—you could not see a person any distance. I don't recollect whether it was as dark as it could be or not; it was about dark. I don't recollect the date, of course. I didn't hear any report that night at nine o'clock after that; I didn't hear any report that night just about thirty minutes before the train was wrecked. I did not hear any other report there that night. I did not hear any explosion down there just before the train was wrecked. It appeared to be a kind of a muffled sound. I think what caused it be muffled to me was being so close to the barn; I think that was the cause of it, because I was so close to the
109 barn. I would think if you discharge an explosive in the open air it would have a muffled sound, but I don't really understand about the muffled sound. I was close to the barn when I heard it: Mr. Rose lived east from me. I lived east from Silenus: Silenus is west of me, and Mr. Rose was east of me. I didn't go down until the next morning. When I went down there the track was torn up. The rail all along was torn up; I think—I suppose that was where the train had struck it after leaving the track; it commenced right at the switch, is my recollection. I can't give you any information about its commencing some little distance before it went off the track and that it merely cut the cross ties The track that I saw torn up was torn by the train after it went off of the rail.

I was standing there looking at the switch stand when I heard some people talking; I don't know whether there were a number of railroad men there or not. I didn't know the crowd at all—didn't

know the railroad people. I knew Mr. Miller and Mr. Coggan. I didn't know Mr. McKay until that day. I just noticed that there was a little different color along on the inside of this. I didn't notice that there was white or gray all around here. The discoloration that I saw on the inside was kind of a light color. I don't know of my own personal knowledge what caused that.

Redirect examination.

By Judge FURMAN:

I am not employed in any way with the Santa Fe railway Company. My occupation is farming.

A. F. MATHIS, called as a witness on behalf of the defendant, being duly sworn, examined in chief by Judge Furman, testified as follows:

My name is A. F. Mathis—Frank. My business is farming. I am not employed in any capacity by the railroad. I live near Silenus, about two miles and a half south of Temple, in Bell
110 County I am acquainted with the country and the roads around Silenus switch. I live about three or four hundred yards from the switch where this accident happened. I live with my father. I remember the circumstances of the wreck which occurred there in which Engineer McGinnis was killed. I was at home part of the time on the day before the night on which it occurred. I went to Temple that afternoon. I returned from Temple just about sundown. When I got home I unhitched my team. I was living there at my father's place. I unhitched my team and fed them and it was about dark when I got through. I remember something attracting my attention about the time I unharnessed and fed my team. It was the report of an explosion. I can't tell exactly—couldn't tell exactly from the sound whether it was a gunshot or a pistolshot. My opinion is that it was not a gun; it was not a pistol; it was too loud a report. I could not tell the exact direction from which that sound seemed to come. I was on the north side of the barn. The switch was a little bit west of me at that time. If the sound had come from the north and east, nothing would have intercepted it—nothing more than some slight timber on the creek. Coming from the direction of the switch, the barn was between me and the sound. I did not hear anything more on that order that night. The first intimation I had that there had been an accident was when I saw the wrecker coming down there the next morning at about sunrise. I afterwards went down to the switch, my father and some of my brothers went with me. I made an examination of the switch stand and the track there. The switch stand itself seemed to be perfect, but the rod at the bottom that leads out seemed to be disconnected. It was just lifted off of that bar here and laying down by the side of it. There was no piece of iron there like this. There was just this one on this other side. I noticed the broken bolt or nut right here—this one (indicating). That is broken near the elbow where the pitman rod goes. It seemed

to be a fresh break. I noticed some discoloration on the leg
111 of the switchstand right under here and up on this. I noticed some dents or scars, and there was part of it ground off of the edge next to the crankshaft here. There was discoloration on the edge of one of the legs next to the crankshaft, and the edge appeared to have been ground off. I could only see that these discolorations were gray. I have seen iron that has been exposed to an explosion and the discoloration on it was somewhat similar to this. I don't know anything about nitroglycerine. I did not think at the time that this discoloration was caused by gunpowder or black powder. I don't — whether it was caused by nitroglycerine; I don't know what effect that would have or what effect it would produce. I am a farmer, and not employed by the Santa Fe at all.

Cross-examination.

By Mr. CURTIS:

I don't know anything except that I heard a report late in the afternoon before and just what I have stated here. I don't know what the report was, and I cannot testify which direction it came from. I had gone home from town and was feeding my horses. I don't know whether the sun set about 6 o'clock on the 22nd of September. It is true that that is the equinox, so on the 6th of October, the sun would set a little before 6 o'clock. I presume it must have been about 7 o'clock that I heard this report. That would be a little over an hour, but I am not sure, because I don't know how long it was between sundown and dark. I don't think I had been home an hour. I would give it as my opinion that it was just before 7 o'clock. I had not heard any other report that night; nothing unusual at all. I did not hear any report about midnight indicating that anybody was interfering with the track down there or causing any explosion for any purpose.

I was down there the next morning. I noticed a little discoloration on this arm here. I stated that I saw the discoloration on the base, and I also saw it on the arm. The discoloration was on this
piece and slightly up on this arm. It was a gray color. I
112 don't know which side the discoloration was on, but it was on the under side; it might have been clear across. I noticed an abrasion or dent along on one edge of this arm. I noticed that that morning. There is a dent right there—that corner is ground off—I am referring to this corner up here. I did not notice any dent down here. I did not notice any discoloration here on the outside. I would not be positive, but I think that switch was sitting on a tie. I did not notice whether it had been pressed upon by force being applied to it. I did not notice whether there was any injury to the tie, on which this switch was attached. I did not notice whether the switch light was burning; I do not know whether the light had been put out or not. If there had been any hole blown out in the ground, it was not sufficient to attract my attention. There were no marks of an explosion on the ground so far as I could see.

Redirect examination.

By Judge FURMAN:

I would not be sure, but I think Mr. E. P. Mathis went down there with me.

E. P. MATHIS called as a witness on behalf of the defendant, being duly sworn, examined in chief by Judge Furman, testified as follows:

My name is E. P. Mathis. My occupation is farming; I live with my father. I was at home on the evening of the night before Mr. McGinnis was killed. I live about three or four hundred yards from the place where the wreck occurred at Silenus. I was picking cotton the evening before that wreck; I quit about dark. I had to go about three hundred yards to the house. I went home immediately. On the way home there was an explosion of some kind that attracted my attention. From my knowledge of fire arms, if it was a gun, it was larger than any I had ever heard. It came
113 from the direction of the switch. There was a little bit of timber on the creek between me and the switch. There is no question in my mind as to what direction that sound came from. It was direct from the switch. I was about 500 yards away from the switch when I heard that. From my knowledge of firearms I would judge that that was the report of an explosion of some explosive. I did not hear anything more that night. At that time it was not sufficiently light for me to have seen a man on the track from where I was. I judge I could have seen a man for some 40 or 50 yards. I was about 500 yards from the track. I was not disturbed again.

My attention was attracted to the fact that there had been a wreck about daylight the next morning. The train standing there called my attention to the fact. I saw a light that I supposed to be in the baggage car. After the wrecker went down, we went down there to the wreck; that was about sunup. I did not make any examination of the switch stand until afterwards. I was close to the switch. I saw that this piece which runs out to the track was not in its usual condition. They were working on that when I was down there. This pitman rod was disconnected at the time; they had it off, working on it. I heard someone say something about powder marks on the switch stand, and I noticed them on the stand I did not notice anything else until my attention was called to it. I did afterwards. I noticed something that looked like smoke there on the stand; I noticed some on this plate here and some up there. If that is the name of it, I noticed some marks on the plate and some on the inside of the legs of the switch—on this here, and on this, is where I noticed the stain. I noticed a bolt broken—this bolt right in here. It was a fresh break. I did not notice any piece of iron missing until I heard some of the men say there was something gone. There was no piece of iron over the pitman rod when I got down there; it was gone. I did not notice any dents or any-

thing on the inside of the switch leg indicating that a piece
114 of iron had struck against it. I heard some gentleman talking about this discoloration; I don't know who they were I did not know Mr. Ed. Miller at that time. I got acquainted with him later. I got acquainted with Mr. McKay later too. There were a number of railroad men there. They did not call my attention to it, they were just talking about it. The place where I saw that discoloration on the base was on here and here, as well as I remember, it passed around under here. I don't know whether some of it would have been under this If this was on it, probably that would have covered some of the territory that I saw the discoloration on That is the line I drew there. I noticed the discoloration on the outside here. I was standing over on the side there to see that—I don't remember the position. I don't know about that over there—I wasn't noticing anywhere except where they stood.

J. D. EPPERSON called as a witness on behalf of defendant, being duly sworn, examined in chief by Judge Furman, testified as follows:

I live in Bell County near Temple. I live about three or four hundred yards from Silenus switch; Silenus switch is a little southeast of my house.

I recall the occurrence of the accident there in which Mr. McGinnis lost his life. I was at home the afternoon before that happened. My business is farming. I am not connected directly or indirectly with the railway company. My land lies on both sides of the railway. I was picking cotton on the evening before that accident happened that night. I live three or four hundred yards north from the switch. My sister, Miss Jennie Epperson, was with me. I noticed a man walking along the Santa Fe track on the right of way that evening. I don't know who it was. I can't tell you exactly what time it was that I saw him, because I did not have my timepiece, but it was just about sundown. He was walking down the railway, going south. That would be in the direction of the switch. I cannot describe his height and his size, but probably his
dress might describe that slightly. To the best of my knowl-
115 edge he was in his shirt sleeves. I did not know the man. I suppose if it was one of my neighbors with whom I was well acquainted and I had thought anything about it, I could have recognized him; I was close enough to recognize him. About that time I went and weighed my cotton and went on to the house. It was then between sundown and dark; it was getting a little dusk. When I got home I fed my stock. I was just through feeding my horses, and had started to milk when I heard a noise like a gun. It was a pretty loud noise. I didn't think much about it at the time as to whether it was an explosion or a firearm or what it was. To the best of my knowledge it came from towards the switch. The first time I heard of the accident was the next morning when I went down to pick cotton, and then I saw the wrecker down there, then I saw the cars. I went on down where the wreck was. I only glanced at the switch stand when I went there; never noticed it much. I

did not notice whether this rod, this pitman rod, was disconnected from the switch, until later, and lying on the ground. It was lying on the ground. I did not notice the switch close enough to tell whether there was anything gone from it. There looked to be a little discoloration on the switch stand. I did not make a close examination. This discoloration looked a little white. Where that discoloration was it looked like a burn of some kind. I am not an expert on dynamite, nor anything of that sort.

Cross-examination.

By Mr. PEARCE:

The man I saw was going in the direction of Heidenheimer, going south. I did not see any man going north with a shoe box under his arm. It wasn't anything out of the ordinary to see a man going down that track. They do not all of them ride in automobiles; some of them walk. It was just the way he walked that attracted my attention. He was walking so very slow at that time, all the time—
at that time of day. They walk faster at that time of the day
116 than any other time. I don't know why that is; I can't tell
you whether it is because they are going to supper, or whether there is any other reason. All I know is that he was walking slow. He didn't have any explosive lighted at the time. I did not even think about him at the time of the explosion. I had not forgotten all about this man until the claim agent came to see me. I thought about it that night when I was down there. I worked that evening—the day that they worked on the wreck, I went down there that night to see them get the passenger train past the wreck, and when I heard them talking about the burned place I thought about the slow walking man. Of course, I had thought about it as I went to the house. I just made the remark to my sister that he was walking slow, was a slowcoach, or something like that; he was not an old man; he was about twenty-five or thirty, I guess. I don't know how far he had walked. I saw only the side of his face but I did not recognize him. He was going on down the track as I quit the field. As I went on to the house, he walked in behind the hill, when I went and weighed my cotton. I had to go about one hundred and fifty yards to weigh my cotton; that was about two hundred yards from the house. This man had had time to get to the switch when I got to the house—he had more than had time. I don't know whether he had time to get down to Heidenheimer; it would depend on how fast he was walking. He just looked to me like he didn't care whether he went anywhere or not. He did not seem to be watching me or anybody he seemed to be looking down the track. He didn't look at me like he thought I was going to blow up the track. He didn't interfere with me or hold me up. He would not have got any money if he had.

Miss JENNIE EPPERSON called as a witness on behalf of the defendant, being duly sworn, examined in chief by Judge Furman, testified as follows:

117 I live out south of Temple. I live near Silenus on the Gulf, Colorado & Santa Fe railway track—Silenus switch. My house is three or four hundred yards from the switch. I remember the circumstances of the wreck there when Mr. McGinnis was killed. The evening before that happened, I was picking cotton in the field below the house. I was nearer the track than the switch. I was picking right down close to the track. I quit picking cotton between sundown and dark. Just at the time we was quitting, I saw a man going down the track. I would not have noticed him at all if my brother had not called my attention to him walking so slow. I did not recognize him at all. I went to the house then after I weighed up my cotton. It was a little before dark when I got to the house. My attention was attracted to something after I got home, after I got to the house. It sounded like a gun. I don't know anything about pistols or guns; I never paid much attention to it. I thought at the time that it was a gun. It was loud, it came from the direction of the switch. I went down to the place of the wreck the next morning. I did not make any examination of the switch stand or the track there; I never noticed it.

B. G. HAWKINS called as a witness on behalf of the defendant, being duly sworn examined in chief by Judge Furman, testified as follows:

My name is B. G. Hawkins. I live in Bell County. My occupation is farming. I am not connected directly or indirectly with the Gulf, Colorado & Santa Fe railway company. I live about a mile from Silenus in a northwest direction. I live on the west side of the track, probably three hundred feet I reckon from the track. Then the switch would be southeast of me.

I recall the occurrence of the wreck there in which Mr. McGinnis, the engineer, was said to have lost his life. The evening of the day before it occurred, I was at home. About dark or a little

118 after, my attention was attracted by hearing an explosion in the direction of the switch. It was just a little before dark. I was sitting on my front gallery—my house fronts west—with my little boy and I heard a report of some kind; it was pretty loud and my recollection is that the fact that the hunting season was not open made it attract my attention. It appeared to come from the south or from the direction of the switch. It appeared that way from what I heard. It seemed to be off at a distance—really it didn't seem very loud. I was about a mile from it. I could not form any opinion from this sound whether it was the report of a gun or a pistol or some kind of an explosion.

My attention was next attracted to the switch during the night. I remember waking up and seeing several head lights there but did not know that anything unusual had occurred. The next morning in crossing the track a negro told me that there was a wreck down there. That is the first I heard of it. I went down there, I think,

about 9 o'clock. I got my paper about 9 o'clock; I read it in the papers and then went down there. The first thing, I went down and looked at the engine and the cars and I saw some men standing around the switch engine and I just walked up and looked it over. They were talking about it. I saw where there was a bolt or something gone and a piece broken off. I don't believe I could show the jury—I didn't get down and examine it. I don't remember that I noticed whether that pitman rod was connected with the switch stand or not. My recollection is that I could see that that bolt was freshly broken off. I did not make a critical examination to see whether there were any burns or powder stains on the stand, but I remember seeing, it seems to me, some little white specks. There was several men around it, but I suppose I was about this close to it.

119 W. J. HESTER called as a witness on behalf of the defendant, being duly sworn, examined in chief by Judge Furman, testified as follows:

I live about three miles or a little better south of Temple. My occupation is farming. I am not connected directly or indirectly with the Gulf, Colorado & Santa Fe railway company nor employed by it in any manner or form. I live a little better than a quarter, between a quarter and a half mile from Silenus switch.

I remember the occurrence of the passenger train being wrecked at Silenus, in which Mr. McGinnis is said to have lost his life. I was in the field picking cotton late in the evening before that occurred at night. When I went to the house I was sitting on the east gallery, I think it was about sundown or a little before when I went on the gallery. While I was on the gallery, just about dusk, my attention was attracted by a report of some kind in the direction of the switch. If that was the report of a gun it appeared to be a mighty large one. My attention was called to the switch again that night. Some time during the night there was a fuss down that way, and I didn't know what it was. I didn't pay any attention to it, or go down that night.

The first I heard of the wreck was the next morning about nine o'clock, I reckon. I went down there as soon as I heard of it; I got down there a little after nine o'clock. I did not make an examination of the switch stand while I was there. I did not look at that at all. I passed along within three or four feet of it, but just went on towards the wreck. I did not take any pains to find out whether there was anything unusual the matter with the switch stand or not. I did not notice whether that pitman rod was connected with the switch stand or not.

120 J. A. HEWITT called as a witness on behalf of the defendant, being duly sworn, examined in chief by Mr. Furman, testified as follows:

I am a farmer. I am not connected with the railway company in any manner whatsoever. I live about six or seven or eight hundred yards from Silenus switch on the G. C. & S. F. railway. I do

not know anything about this accident—did not know anything about it until after it occurred. I did not hear any explosion. I went down there I suppose about sunup or a little before—just as early as I could get off. I made an examination of the switch stand at the point of the wreck. I went right to the switch stand the first place. I found that switch bar and the connection off. By "off" I mean disconnected from the switch stand. I found it lifted off of the pivot, and that cuff there, whatever you call it, wasn't on it at all. This cuff here was not there at all. I looked for it and could not find it at all. I found a bolt broken on the base of the stand—the bolt that holds this cuff on there. That seemed to be a rather fresh break. I thought that the switch stand showed indications of a powder stain or burn. I examined it very carefully. There was a kind of a brown looking substance there on it, on the switch stand itself—down there on this plate, I mean—on this plate —on this cuff. I found it right down under this, on here and up on the stand. I decided at that time that there was a dent there. It seems to me like that place is right along on there, on a sharp edge—I didn't mean a dent, I just mean a sharp edge—I don't call that a dent—it has got a sharp edge. I will take that back about the dent. When I got there it seemed to me like when that piece was blown off or knocked off that this sharp edge was shorn off. This wasn't there at that time—this cuff. I never saw that cuff. I found indications there that this cuff had been brought into contact with something else. There is a dent in there. I was not talking about the dent in this—I was talking about the rough edge of it
121 there. There is a dent in that cuff. When I went there there was no cuff at all on this and that pitman bar was off. I have not had any experience at all with the effect on iron of an explosion of dynamite nor of nitroglycerine. I know something of powder, but not of its effect on iron. I cannot tell you whether that appeared to be the result of an explosion or not. I don't know anything about dynamite or what sort of a color it would leave there. This was a kind of a gray or dark yellow deposit of some sort.

Cross-examination.

By Mr. PEARCE:

I didn't say it was brown—I never said anything about anything brown. It was a kind of a dark looking color, sort of a gray, kind of a dark color, kind of a little gray looking color. It was right down here—right under here. I think right there is where they put it if they dynamited it at all. They told me they did not use a stick of dynamite, but a liquid of some kind. I don't know whether they could pour it down there or not—I never examined it —I ain't no dynamite fellow. I suppose that they put it under there. I could slip my finger under there. I can put it here—I wasn't talking about that—I didn't say the color was here—it is over here. I don't know how you are going to get it under there; you might pour it under there. I guess you could secure it in some way.

Redirect examination.

By Judge FURMAN:

I am not an expert in such matters.

Recross-examination.

By Mr. CURTIS:

As to the condition that I found there, I did not mean a dent—I meant a kind of a scrape—when they prized it off it would be scraped—the edge of it. I suppose if you was to hit that with
122 an axe and knock it up against the edge there, it would scar it up. I don't know how it could have been done.

R. L. PAINTER called as a witness on behalf of the defendant, being duly sworn, examined in chief by Judge Furman, testified as follows:

I live southeast of Temple between a mile and a half mile from Silenus Switch. The switch is southeast from my house—mostly south. I recall the fact that there was a wreck there some time ago, and Mr. McGinnis was killed.

On the evening before that wreck I was in the field picking cotton up from the house. When I was picking cotton I was somewhere between a quarter and a half mile from the switch, I suppose I was three or four hundred yards from the railroad track; may be five hundred yards. I did not notice anyone going down the track in the direction of the switch. Late in the afternoon my attention was attracted by an explosion down there, but I could not tell from where I was whether it was right at the switch. There was a hollow or a grade between me and the switch. I was not in sight of the switch; I can't see the switch from the field or the house. It was between sundown and dark that I heard this sound of an explosion. I went down to the scene of the accident the next day. I noticed the switch stand when I went down there. It was something like nine o'clock in the morning when I got down there. I went to the gin in Temple that next morning, and I didn't know anything about it until I got to town.

I was looking at the piece that was blown off of the stand—it was off—I don't know how came it off. I can't tell you whether this pitman rod was connected with the switch or not. I noticed that there was a bolt or a cuff that fitted on the other side that was missing. I noticed that there was a bolt that held that on that was broken; it was a fresh break. I was looking at the stand and I discovered a gray sediment or something like that on it. I did
123 not make a close examination of it. I don't know just exactly what part of the switch stand that deposit was on, but somewhere near that bolt there, where it was broken. That is all the examination I made.

Cross-examination.

By Mr. CURTIS:

If the new piece of iron was bolted down here and left in that condition, I would think it would naturally be a different color under it there where it had been covered up and not exposed to the sunlight and the rain than it would be on the outside. I would naturally think that. I would think it would be a darker color on the outside where it was exposed to the sunshine and the rust. I did not examine it closely. I just heard a report there that evening; I didn't know what it was, I just knew it was a kind of an explosion.

W. L. REEVES for the defendant, being duly sworn, examined in chief by Mr. Furman, testified as follows:

I live about a mile this side of Heidenheimer. Silenus switch, you might say, is north from my house; it is about two miles—a mile and a half or two miles. When the wreck took place I was at Heidenheimer; I lived at Heidenheimer at that time. I went up there to look at the wreck in the evening after dinner. I heard about it before dinner, but I did not go up there until after dinner time, about dinner time. There was a good crowd of people there. I went up there and looked at the switch stand. I discovered from my examination what looked like powder or something burned there on the switch stand. Me and Mr. Bardon stood there and looked at it. It was there in front somewhere that I saw these stains. It looked like there had been something burned there, powder or something there—I can't tell you what it was. There had
124 been something burned there, but I could not tell what it was; I don't know anything about dynamite or nitroglycerine or powder or the effect it would have on iron.

Cross-examination.

By Mr. CURTIS:

There was a white spot there like something had been burned there. There is a white spot there. I don't know whether or not anything had been burned there; I would not swear to what discolored that. To the best of my recollection, it was along there somewhere, it was on that piece of iron somewhere.—I saw what looked like it was white, like you might have burned powder—poured powder down there and set it on fire. I guess there are other things besides powder that make white stains; you might put some white there. Besides the color, it was smoky. It was a smoky color. If you set powder on fire on a rock and stick a match to it, it sort of resembles that. It was a color that you see to black powder burned on a rock. That is the color I mean; pour black powder on a rock and burn it and it will make a smoky color. I never said positively that it was out here—it was on there somewheres. I don't recollect where it was. It was on that piece of iron there somewheres. I don't recollect whether it was out here or over there; it was down here—right in there somewheres. I am positive about that. It was right in there somewheres.

R. L. BARTON for the defendant, being duly sworn, examined in chief by Mr. Culwell, testified as follows:

In October 1909 I lived three and one-half miles southeast of Temple, about three or four hundred yards west from the switch where the wreck occurred on the night of October 5. I recall the incident of that wreck. On the afternoon before that I was picking cotton; I was on the east side of the track not very far from
125 the switch. There was people up and down near that switch all the afternoon; there was a fence gang. I saw a man sitting on the switch a little before sundown; I don't know who he was. He was just sitting on the switch. That is the same switch where the wreck occurred that night. I heard a report that night just right at dark. I was going from the field to the house. That was after I saw the man at the switch. It was a loud report; I think it was louder than a gunshot.

I went down to the place of the wreck the next morning. I made an examination of the switchstand. I found something wrong with it. That rod there was off. The bolt was broken and the lug was gone. I noticed a little blotch on the switch stand, an unusual color. I cannot say whether it was such a stain as you might expect where there had been an explosion. I was down there when the lug was found. I was there about twenty minutes after it was found; I was there when it was fitted over this place; it would have fitted if it had not been bent some way. This lug is like the one that was found there.

Cross-examination.

By Mr. PEARCE:

A man was sitting on the switch. I don't know whether he was an old or a young man; I was not close enough to see if he looked like he was tired. I don't know whether I saw him before he got to the switch or not. I saw several men walking on the track. One of the man I saw had something under his arm. This man might have been by himself; he was just about the switch sitting down. I had seen people do that frequently; there was nothing unusual about that. I wasn't close enough to see how he looked. I didn't think anything about that. I noticed some kind of blotch of color on the stand. It was right under here that I saw that. It was kind of a grayish color. Right there where that lug would fit, I saw where this lug is fitting over here—this had been freshly broken off. I saw that bolt that had been recently broken; that left a new place,
a brand new place—this other part here had been exposed
126 to the weather and this had not. Nothing can get under there, not even water.

M. R. TARRANT called as a witness on behalf of the defendant, being duly sworn, examined in chief by Mr. Culwell, testified as follows:

In October of 1909 my occupation was that of bridge foreman on the Santa Fe; I was located at Temple at that time. I recollect the time when No. 17 was derailed at Silenus. I had occasion to go down

there in the afternoon, as well as I remember about three o'clock, somewhere along there about the middle of the afternoon. I made an examination of the switch stand. I found the shield that protects the connecting rod was gone and the connecting rod was disconnected from the mainstand. I examined it, smelled of it, and looked at it. Had a kind of a frosty color, something like that. I got down and smelled of it, it smelled as though there had been some explosion there of some kind. I have used explosives some. I am a bridge man. This smelled like an explosive. I wasn't there when that lug was found.

Cross-examination.

By Mr. PEARCE:

I can't tell you whether that explosion, from the way it smelled, was before six or after six o'clock, nor how loud it was, nor whether it was black or white powder, nor dynamite nor nitroglycerine. I have never handled any dynamite or nitroglycerine. It showed to be an explosive of some kind, but I could not say what it was. The dynamite and powder explosions that I have seen have a smell; I never did smell a nitroglycerine explosion. I cannot say that this was a powder explosion; I cannot say that it was dynamite. There perhaps is a difference in the way powder and dynamite explosions smell. I can't tell which this was. I never noticed particu-
127 larly whether there is any difference in the color that dynamite leaves and the color that powder leaves. I only noticed the color that was there. I never noticed the color that dynamite or nitroglycerine leaves on iron. The color on here was kind of a light frosty color—grayish. It was in there—in right directly under this lug. There wasn't any of it under here, or I didn't notice particularly any of it back here. I just noticed a little around this one—kind of a light grayish color. I didn't see the lug.

W. L. ALEXANDER called as a witness on behalf of the defendant, being duly sworn examined in chief by Mr. Culwell, testified as follows:

I occupy the position with the Santa Fe of general claim agent; I occupied this position in October, 1909. I remember the occasion when No. 17 was derailed at Silenus. I went down to the wreck and got there that evening. I made an examination of the switch stand and the bridle rod or pitman rod or connecting rod, whatever you call it, on the evening of the wreck, the evening following the wreck, between seven and eight o'clock, I presume. That was made by lamplight, I think, or with matches, or some other way, probably. Probably it was not so late—I don't remember that. I found evidence that looked like something had been exploded on the switch stand—the lug was missing on the right side looking south and the bridle rod was disconnected. I examined that nut that held the lug in place. That was broken off and appeared to be a fresh break. During the following day, this timber was sawed off—it extended through the track—it was sawed off and sent to

Galveston and was in my office up until the time of the last trial. During the time that it was in my office, that switch was not tampered with in anyway. It came to court in the same con-
128 dition that it was when I removed it, in exactly the same condition as when we removed it from the track at Silenus.

I made an examination of the cross over switch. I found that the points of the switch were intact. The points were perfect except on the left switch, that is, the left point looking south, which would have nothing to do with the main line when lined up, and it had a little silver off of it. That would be four or five inches from the main rail when lined up for the main line. I have examined this cross over switch down in the courtyard here; I examined it at the last term of court but not this time. That appeared to be the same cross over switch that was in there; that switch was removed and taken to Temple for safe keeping and brought over here for exhibition on a flat car.

I was there when that lug was found. It was found in a field on the left side of the track looking south about 240 some odd feet in a southwesterly direction—southeasterly direction, considering that the railroad runs north and south; it was found clear off of the right of way. There had been considerable effort made to find that lug. Thirty-five or forty people, including myself, had been looking for it, and finally we would organize systematically and go a few feet apart and come around: we did that way, but it was found by a negro. With the lug removed, all you would have to do is to disconnect—to disconnect the switch, would be simply to lift that pitman rod off of the shoulder. After it is off of that shoulder the switch is not controlled by the switch lever. It would not have any effect; would not control the track at all. After you disconnect this pitman rod you could by hand, move these switch points any way you wanted to.

It is not at all customary on the Santa Fe or any other railroad that I know anything about, to keep track walkers and inspectors of switches going out over the track at night unless it is
129 something extreme—a heavy rainfall or overflow, something to put them on notice. Aside from that, it is not customary to have men walking the track examining the track at night. No railroad in the State does it. You can't very well operate a railroad without switches. I recollect the character of country down where this switch is located; the track there is straight track; it is not in a cut; it is open country there. That switch is on a straight line of track. I suppose it is slightly down grade going south, but it is a very slight percent. So far as the eye is concerned, there is practically no grade.

In the construction of this switch stand the purpose of having this heavy lever here to fit down there in this curve and this lug to fasten it in position, is to prevent anyone from handling that switch or throwing it in any way other than as authorized in the pursuance of work. It is not possible to move that switch when this lever is down and the switch is locked, except by the use of force With that lug in position there is no weight or strain on the lug

at all. It is a fact that it is not connected with any part of the switch that bears any strain. Its purpose in being there is to prevent the connecting rod from pulling off of the elbow that fits on there; it is just a safety device. I have occasion to examine safety devices a great deal. It is a part of my position to suggest means or machinery or anything that I find that will tend to make the service safer. I do it monthly or daily. This is a standard switch stand; I do not know of a make of switch stand that is any better adapted for the purpose it is intended than this switch.

Cross-examination.

By Mr. PEARCE:

I have only worked for one railroad. I was never conductor for the Santa Fe or brakeman. I have never occupied any other position than in the claims department. I think I occupy one
130 of these working positions now.

In Temple, within the switch limits, they do not have track walkers in the night time. We have men whose duty, in connection with other duties, it is to report on the switches and inspect them day and night. They have a night man that puts out switch lights at night. These men report the condition they find them in within switch limits; that applies to day and night time. Out of town stations between switch limits, in the daytime, sometimes have a track walker or leave that to the section force. In switch limits I don't think every train crew that goes through is supposed to report on it and inspect it—I don't think train men are supposed to. For instance, if you got out of Heidenheimer and go through a switch, the train crew would be responsible if they should run through it—it would be their duty to spike the switch at once or put out a flag until it was spiked. Out in the country between stations and between switches they have track walkers or section men, and the section men light the lamps and report conditions if they find anything out of the usual with the switch and repair it. It is their duty to examine it.

It was between seven and eight o'clock—it might have been a little earlier on the evening that it happened that I reached Silenus; I got there that afternoon. I did not smell anything there that evening. I did not smell anything there the next morning. I looked at the switch. I saw the discoloration along on the switch stand under there and there. I don't remember that I found any out here. There probably was. I found some right under here, I think. I don't think I found any up on top here nor in there.

MAYNARD ROBINSON called as a witness on behalf of the defendant, being duly sworn, examined in chief by Mr. Culwell, testified as follows:

131 I am master mechanic for the Santa Fe at Temple. I have held that position nearly five years at Temple.

I remember the occasion when train No. 17 was wrecked at Silenus I went down there, I think it was, between three and four o'clock in the morning, on the wrecker. That was a couple of hours or

such a matter after the wreck. We took the doctors down there with us. When I got there, relative to the switch stand, I found the pitman rod was disconnected and the safety lug was missing. The light was burning and showed for the main line, showed a clear track. This long rod that is attached there is called the pitman rod. That was disconnected. With that disconnected, that switch would not have any control whatever over the track. With that disconnected, the light could show for the main line and the points moved anyway. Handling the pitman rod with it disconnected would not affect the light on the switch stand at all. I made two examinations of the place where that lug was, one when I arrived there in company with the superintendent, and one after day light. I examined that lug or bolt that holds it in place. I saw the break. I am a machinist. I would say that that was an absolutely fresh break. That is a three-quarter inch rivet that holds this lug in place, to the best of my recollection. The lug that it holds in place is constructed of boiler steel, I think about one-fourth of an inch thick by two and one-half inches wide, something like that. With that lug in place, it is impossible to disconnect the pitman rod from the switch; it would take a great force to remove that lug. The evidence of the rivet, in my opinion, showed that force had been applied. There was not any evidence around there to cause me to form any conclusion as to what kind of force had been used until the next morning. I had heard some of the farmers talking of an explosion and I went and made an examination of the switch stand and found what I considered evidence of an explosion. That evidence was a discoloration on the switch-stand. That lug could have been removed by the use of dynamite or some other explosive

132 I did not examine the track. I was not there when that lug was found; I had taken some of the wrecked coaches back to Temple and did not see the lug until we returned to the wreck.

I have examined this switch stand. There is nothing the matter with that switchstand now, except that that lug is gone. If the lug was replaced we could use that switch stand now. That switch stand is in safe condition for use with that lug put back. The only thing the matter with that switch stand is that lug is gone. I don't think that by the mere splitting of a switch by a train that that damage could have happened to that switch stand. That switch is located the length of that pitman rod from the track and I should say another foot where it connects with the points to the bridle rod—I think that is the name of it. From what I saw there, I am not in a position to say that any part of the train struck that switch stand. No part of the train struck that switch stand—could have struck that switch stand and simply have removed that lug and not done any other damage. I don't think any jarring or jolting in the track, striking of switch points in the track by a train, could have forced off that lug and done no other damage. There is absolutely no weight or pressure resting on that lug when a train is going over the track. That lug is simply a safety device to hold the pitman rod in position—that is the name of it—safety lug. When the train goes over the track, if the switch is out of order and the rails forced

in any direction, they would apply force to this pitman rod. By applying force to the switch points, they would not apply force to the pitman rod at all. It is not connected with the pitman rod at all. I don't know what the height of one of these switch stands is. I don't know the size or dimension of this pitman rod. I don't know the character of material that switch stand is constructed out of. I can't state by just looking and forming an opinion.

This lever by which the switch is operated was in proper position that night when I discovered it. When I went there it was
133 in the socket and locked, so that the switch had not been thrown by the use of that lever. I know this is a Santa Fe standard switch by seeing them on the Santa Fe storage platform. That is the only way I know it. I don't know how long this particular switch stand had been in use; I could not approximate it. I had nothing whatever to do with the track. Assuming that it had been in there about a year, it had not been in there long enough to make it defective and dangerous to use.

Cross-examination.

By Mr. CURTIS:

This pitman rod connecting with the switch stand here is the rod that holds the switch points. Sometimes I can tell whether a thing is straight by looking at it. From looking at that rod I would say that it is bent now.

J. C. CURRAN called as a witness on behalf of the defendant, being duly sworn, examined in chief by Mr. Culwell, testified as follows:

I am with the Santa Fe, occupying the position of road master. In October of 1909 I was roadmaster between Temple and Somerville, which includes the Silenus switch.

I recall the time when No. 17 was derailed at Silenus I had made a daily trip over that track every day for about six months previous to that, and I came over that track on the evening before, on train No. 6, about 2:50, I judge, in the afternoon. I ride on the rear end when I am riding on a train, for the purpose of observing any defects on the line. That is my whole duty. I was riding on the rear end of train No. 6 that afternoon when I went by Silenus. I saw this switch. It was just like any other switch we have on the main line. It was in safe condition for use. It was good for a hundred miles an hour.

It is customary for section men in this country to work from seven o'clock in the morning in summer time until six
134 o'clock in the evening; in the winter time we quit at half after five and give them half an hour for dinner on account of the days being short. In October they quit at six o'clock. It is not customary on any road in this country to send a man out after six o'clock to examine switches or inspect the track except in the event of storms or washouts—anything to interfere with the passage of trains. There was not any storm or washout in the vicinity of Silenus on the 5th of October that I know of. There was no occasion for sending a man down the track to examine this switch

at all. As roadmaster, I have charge of the track and that includes the switches. These track walkers and section men work under me. If I want them to go down the track I am the one that orders them to go. Suppose that tonight there was to come up a great rain and I was familiar with the track and knew where the weak places were, and I knew from the volume of water that that track would give way. I would take steps to ascertain the condition of the track; I would issue instructions by giving the chief dispatcher orders to send the section men out over the track to watch this track. If conditions were as they are to-day, I would have them stay in the shade, because there would be no need of it. It is not customary on the Santa Fe or any road in Texas that I know anything about to send trackwalkers or inspectors out during the night to inspect the switches. I have never known of it. I have come in contact with roadmasters and I have never known of it in this country.

This switchstand is what we call the Star stand—the best on the market. It is a recognized standard switch, made in Chicago. It is solid wrought iron; it is all one piece. If that lug was back in position I would like to have one hundred of them for use now. That is all that is the matter with it. It is safe to use with the lug put back in position, but not as it is now. That rod is about six feet long, and the other rod, called the bridle rod, is in or
135 about the same length. It is probably a coupld of inches thick or a fraction over. It is wrought iron.

Cross-examination.

By Mr. PEARCE:

My saying that it is not customary to send out track walkers at night in Texas and answering that it is not customary in this country, I mean in the United States. I don't know whether it is elsewhere or not. I have come in contact with men from other states when we have discussed these questions pertaining to the road, discussed them in our conventions, and I have never known them to send any body out except on those occasions mentioned.

I examined this switch the evening before, and found it was in A1 condition. I was not keeping time when we went over the switch, but I judge that we might have been making about forty miles an hour going north. I inspected that switch going forty miles an hour. I could see that that lug was not off. I did not see it off. I did not see it on. I have examined this switch just the same as every other roadmaster examines them. The switch points were in perfect condition. Perfect condition—they were all of them. I noticed this as I went forty miles an hour.

W. W. WELLMAN called as a witness on behalf of the defendant, being duly sworn, examined in chief by Mr. Culwell, testified as follows:

I am a locomotive engineer for the Santa Fe. I have been in that service for the past *for the past* four years, but previous to that I was with the Santa Fe for about seventeen years. I did not say I was a

locomotive engineer for seventeen years previous—I said I was with the company for seventeen years previous to the last four years, and I have been out of that kind of service. I understand train service. I have had experience in running through switches and in running over switches. I have had experience in that.

136 I have examined this switch stand. I know what the trouble with it is. I do not think it would be possible for the injury to be inflicted to that switch stand that has been inflicted simply by a train splitting a switch. I have never seen it occur and I do not believe that it could be done; that is my best judgment. It would take a vast amount of force to pull off one of these lugs like this one that is off. I am not prepared to say whether any force that is sufficient to tear off one of these lugs would do other damage to the stand or not. That would depend altogether on how the force was applied. Assuming that a train split the switch, that would probably do nothing whatever to the switch stand. There is no reason that I can think of why the mere splitting of a switch by a train would force off that lug. I can't conceive of any reason why the splitting of a switch and forcing that lug off because it is not in contact with the pitman rod. It is not fastened to the bridle rod. I can't see how that would have anything whatever to do with it.

Cross-examination.

By Mr. PEARCE:

At the present time I am round house foreman for the Santa Fe. Looking at picture No. 4—that is the bridle rod and this is the pitman rod. With this pitman rod disconnected the lug broken off and the pitman rod lifted off and then the switch point over here cocked, so there would be no resistance there if a train comes down here and strikes this cocked switch, if the rod was free, absolutely free, there would be no occasion for it to be bent. If the switch were cocked there and the engine would strike this switch and force the point over, the force might bend that pitman rod and the bridle rod also. If this one was bent, it might have been done that way. It could not have been bent if it had been disconnected.

If it had been lifted off and put on the ground, it would not
137 have been bent.

Redirect examination.

By Mr. CULWELL:

Carrying cross ties along there and dropping a cross tie on there would spring it. I am not in position to say that they do carry a lot of cross ties along there.

J. S. GRANT for the defendant, being duly sworn, examined in chief by Mr. Culwell, testified as follows:

In October, 1909, I was division lineman for the Santa Fe. I was on train No. 17 when it was wrecked at Silenus. I was riding in the smoker. The first thing I noticed that caused me to know that

there was something wrong, was that I was trying to hold myself together to get hold of something to hold to to keep from falling. I got out of the train; I raised a window and got out as quick as I could, before the train stopped; the train went about ten feet after I got out. I picked myself up, scrambled around there and got my tools together and looked around and saw there was some damage done, and I thought perhaps there might have been some wires damaged so I put on my hooks and went up the pole to see whether there was any of them broken down. I found there wasn't any broken, so I went on up to the top of the pole and was looking around over the wreck. I seen two men standing over inside of the right of way—just inside of the field. I don't know just exactly how far the right of way fence is from the track—any way, the telegraph line is 42 feet from the middle of the track and I don't know how far it is the other way to the right of way fence but that was 175 or 200 feet from it any way.

Cross-examination.

By Mr. CURTIS:

138 I was in the car, in the smoker. I was working for the Santa Fe. I had my climbing apparatus with me. When this wreck occurred my climbing apparatus was in my tool bag. Indeed I did not put them on before I went out of the car. I jumped out of the window head first. I took my climbing apparatus with me. I put them on my feet or legs—you can't put them anywhere else. I put them on after I got outside of the car. I did not see anybody when I first got out of the car. I was on the west side of the train. Then I put on my climbing apparatus and climbed the telegraph pole. I was not looking for anybody until I got up on top of the telegraph pole; I was looking for the wires. I never saw anybody on the outside until I got out of the car and climbed up the pole. I saw lots of them on the inside. I don't know who they were. I don't know whether these men got off of the car before I did and ran, if they did they was pretty quick.

W. E. MAXSON for the defendant, being duly sworn, examined in chief by Mr. Culwell, testified as follows:

I reside in Galveston, Texas. I am general superintendent of the Gulf, Colorado & Santa Fe Railway Company. The duties of that position are to supervise the maintenance and operation of the road.

I know where Silenus switch is. I know when that passing track was put in there; it was put in the latter part of 1907, probably not finished up until the early part of 1908. It was put in in that year, in the winter. That is the place where this wreck of No. 17 occurred in October, 1909. The weight of the rail in the main line along there is 85 pound steel; in the side track or cross over, we used sixty pound steel rail. We use creosoted pine cross ties in the track.

I went down to the wreck the day following the accident at the time No. 17 was derailed. At that time I made an examination or inspection of the switches and track at that place. When I got there the switch had been reconnected and was in service but I observed

the indention on the ties where the wheels had left the rail,
139 indicating that it had left the rail near that point, and I asked Mr. Hull, the superintendent to place the head rod and the switch points in the position in which they found them immediately after the accident. They did and that indicated that the points were open and allowed the wheels to drop in on the ties on the cross over and the engine and part of the train followed the main line rail where it caused the engine to turn over. These switch points were taken out of the track and taken up to Temple and it is my understanding that they are now at court. The condition of these switch points when I was down there was what we call first-class condition. One of the points, the outside or east point, which set against the rail when lined for the side track, was slightly worn at the point but not sufficiently to be unsafe or in any way dangerous. If the points are open, it will ditch a train. Whether the point of a switch are worn or not, if it is cocked, what we call cocked, or partially open, it is going to wreck a train if it runs through there without regard to the switch points. Suppose these switch points had been in there only two days and yet had been left open to catch the flange of a wheel in the train, the result would be the same. If the point is open enough to catch the flange of a wheel, it don't make any difference whether that point is worn or new, the result is going to be the same. That track was put in there the latter part of 1907. This accident occurred in October of 1909, which was less than two years. With the character of use that that track and switch had had, it ought to have been in good condition. We keep them in good condition all the time, regardless of the service they have. This switch stand was taken out of there and taken to Galveston, and was kept in the general claim agent's office until brought here to court. The condition of this switch stand when I got down to the wreck was just the same as it is there except that the head block was fourteen feet long. The switch stand had never been removed from the head block. That is where it
140 was standing when the accident occurred. That head block is fourteen feet long and extends through under the track; it was sawed off between that and the end of the track. The inside lug was missing. Aside from the fact that that lug was off, this switch stand is in first class condition. If that lug was put back in position, this switch stand would be in proper condition for use. It would be safe to use this switch stand if you would rerivet the lug back in the original position. That is the only thing that is the matter with the switch stand. I don't think that switch stand could have been damaged in the way it is merely by a train running through and splitting a switch. I have never seen one damaged in that way by being run through. I don't think it would be possible. I have had fifteen years' experience as a railroad man. I never did see that character of damage done to a switch stand by a train splitting a switch. There is no kind of strain or pressure on that safety lug. The safety lug is the thing that is gone. Its function is simply a shelf to prevent the connecting rod from being lifted off the stand. The pressure is on the stand and in case of a pair of wheels splitting the switch, the pressure would be against the side

of it and would either break or bend the points between the base of the stand and the side, but there would not be any pressure at all on that lug unless there was something that would catch in there with the flange to pull it up. Any ordinary train would not cause any pressure on the lug.

I have no experience in the use of explosives. I have seen dynamite used, and know what the effect would be, but I have never used it personally. As I remember, the weather was clear and pleasant about the time of this wreck, warm, if anything. There were no heavy rains to my knowledge. It was not raining the day I was there after the wreck. Under normal conditions and since I have been general superintendent of the Santa Fe, it has not been usual
or customary to have track walkers go over the track at night
141 as a regular proposition. It has not been usual or customary under normal conditions, such as existed at that time, to have the switches inspected during the nighttime. I do not know of any road in Texas where it is customary. I mean by that that such inspection of the track and switches as railroad companies usually and ordinarily give to these things is in the daytime. Our rules require the section men to pass over the sections at least once during the working hours of the day or to send some one. Of course, if anything is out of order or condition, they have to repair it or protect it with orders, so that the trains will be advised of its condition. The only time we use a night force is in some emergency or in cases of heavy storms; then our section force goes out and protects these things. The only time it is usual or customary for railroads, including the Santa Fe, to have men go over the track at night is in cases of emergency or heavy rainfall, or some other unusual condition. We have had, right in the vicinity of Temple, a night watchman on our track for other purposes. It was when we had reason to believe that our switches or tracks were being molested by outside parties, and we took the precaution to try to protect it the best we could. Under normal conditions we do not employ men for this. If a switch on the M. K. & T. railroad in this county had been tampered with, supposed to be, and a train wrecked, under these circumstances we do have our track watched at night—we did that for a period of two or three weeks, because we had information that we felt it ought to be done.

Prior to the date of this accident, I had received no information, nor did I know of any condition that made me feel that this particular switch was likely to be tampered with. Had I received any information that looked suspicious along that line, as general superintendent I would have requested the superintendent to have his roadmaster give special attention and protection to whatever locality
or piece of track the information indicated was in jeopardy.
142 I come in frequent and probably daily contact with the train operatives, the engine men, when I am on the road. I am in a position to say that engine men know that under ordinary normal conditions, the track is not inspected in the night time. They know that. The country at Silenus is an open, rolling country, I should say. The switch is located on tangent track; I mean by that, straight track.

Cross-examination.

By Mr. CURTIS:

As to whether it is the duty of a man in one department of the railway service to know the duties of persons in all other departments, that depends entirely on who you apply that knowledge requirement to. It would not be the duty of the section foreman to know the duties of the machinist and vice versa. It would be the duty of an engineer to know the duties of a master mechanic or a section foreman only insofar as it applied to his road service. Insofar as it pertains to his duties as an engineer on the road, it is his duty to know the duties of a section man or a superintendent or a roadmaster or a master mechanic. It certainly is the duty of an engineer to see that the track is in safe condition before he uses it. It would not be his duty to make a trip over it and inspect it before he goes over it. It would be his duty to look down the track and see whether the switch was properly set. He would have to presume that I, as superintendent, and the section men, had done our duty in furnishing him a clear track. It is my duty as superintendent to inspect the track, roadbed and switches in a general way. I can't say that I have made a personal inspection of the ground at Silenus after the switches were put in there other than to pass over the road frequently. As I remember, I was over the road
143 three or four days before this accident, and I inspected it in a general way. I passed over it on a passenger train running at the usual rate of speed, forty or fifty miles an hour. That was the only inspection I made as superintendent.

I was down there on the night of the wreck. I did not see the switch until after it had been connected up and put in service. I could not testify on my oath as an honest man that Bill McGinnis knew the condition of that switch on that night. I don't think anybody else could. I don't remember what questions, if any, are asked an engineer on an examination for train service, pertaining to the inspection that railroad companies make with reference to section men and track walkers. I would not undertake to swear to that. I think the production of our examination blank would be the best evidence about that. I haven't got one, but I can get one. I haven't examined the records, but I think that at the time Mr. McGinnis was killed, the run from Cleburne on No. 17 was worth about $225; I think that is correct. Since then there has been an increase of wages of about eight per cent, I think. That would make it worth about $250 a month now.

Redirect examination.

By Mr. CULWELL:

The run would pay just what a man himself was willing to make out of it. I suppose about the maximum amount, considering that he works every day in the month, and doesn't lay off, is about $250.00. I don't mean that there is a fixed salary of $250.00 or even $30.00 a month for this run. It depends on the man and how much time he put in.

I recollect these photographs. They were taken at Silenus on the afternoon of October 7th when I was there, on the day following the wreck. I was there when they were taken. They represent the wreck. That appears as I saw it when the photographer took them.

144 Recross-examination.

By Mr. CURTIS:

With reference to this $250, in a general way, engineers who work regularly on those runs make that much or more. I judge there are several of them here and you will be able to get the exact amount. I did not check up the pay rolls We pay overtime in addition to the amount that is made on full time.

R. ROBINSON called as a witness on behalf of the defendant being duly sworn, examined in chief by Mr. Culwell, testified as follows:

I am an engineer in the service of the Santa Fe. I have been in that service for twenty-two years. I have had a run on what is called the second district, which is south out of Temple; I am on that run now. That goes south by Silenus. Under normal conditions I know that it is not usual and customary for the Santa Fe to inspect its tracks and switches in the nighttime. As an engineer I know that. That is a generally understood fact among train men; they all understand that.

Cross-examination.

By Mr. CURTIS:

I know what the duties of an engineer are. I do not know what the duties of each man in the service are. I cannot say that I am familiar with everybody's duties. I do not know what the duties of a master mechanic are or a superintendent or a section foreman are. I never had any experience in these lines. I do not know the duties of a trackwalker; am not in a position to state them, because I have never been in that service. I cannot say what W. T. McGinnis knew in that respect. I would not attempt to say.

F. D. GRIFFIN called as a witness on behalf of the defendant, being duly sworn, examined in chief by Mr. Culwell, testified as follows:

145 I am division engineer for the Santa Fe for the southern division. In October, 1909, I was assistant engineer on the Southern division; that is, civil engineer. The duties of the position I held at the time of the Silenus wreck are rather varied. I make up estimates for new construction, supervise the work, in a general way see that standards are maintained—the duties are so varied that I cannot name them all. I see, in a general way, that the track is maintained in standard service, and that the equipment of the road and the roadbed are kept in our standard shape. I am supposed to know that the track is of standard construction, and that the equipment is standard track equipment. I do know that.

I was familiar with the track at Silenus where this wreck occurred. This is the same switch that came from Silenus I was down there on the morning of October 7, which is the day after the wreck, about eight o'clock, I suppose. At the time I got there the pitman rod on this switch stand was loose from the stand, and the right lug, safety lug, was missing. I made an examination of the switch stand. I saw evidence there that force had been used to remove that lug. The lug had been wrenched off by force. The principal condition that indicated to me that force had been used to remove that lug was the bright condition of a piece of broken steel. That was this rivet here that is in this position. Its condition was bright and shining. That indicated that it had been broken recently.

I consider that I am familiar with the use of explosives. Nitroglycerine is a composition of glycerine saturated in nitric and sulphuric acid and there are many kinds of dynamite, but dynamite in general is nitroglycerine with an absorbing substance in it to remove its great danger; that is the commercial form of dynamite consists of various percentages of pure nitroglycerine in an absorbing substance, which can be sawdust, it can be limestone shells, or it could be anything at all that would take up the fluid nitro-
146 glycerine. There are two dynamites in usual use. One is called 60% and the other is called 40% and the 40% is called average dynamite. It consists of forty per cent of nitroglycerine and about 50% of nitrate of soda, 11% of sawdust, and possibly one per cent of carbonate of magnesia, and as you increase the amount of nitroglycerine you decrease these fillers that go with it to a smaller percentage. The terms powder, nitroglycerine and dynamite are to a large extent interchangeable. There is giant powder that is practically nothing but dynamite. There are the Judson powders and there are hundreds of compositions on the market that consist in their main ingredients of nitroglycerine and a filler, which relieves the dangerous carriage effect. You cannot handle nitroglycerine; dynamite you can handle with ease.

From my examination of that switch stand and the character of the damage that I saw there, it was my opinion that that could not have been inflicted by any other means than an explosive. I was a little late in getting there, but at that time there was still stains on the iron work which were similar to stains which could have been left by the explosion of dynamite. These were grayish white or any similar color to that, you might say, but they had been handled so many times that you could not be sure of the original color. These stains were similar to what they would have been if an explosive had been used. If an explosive had been used in that case it should have made a loud noise. The iron would give away the sound better than wood or dirt either. It would be as easy to place an explosive in here, that is, to hold this up, to illustrate on this one—a stick could be placed in there if it was a stick, or any other explosive could be placed in there slightly, it doesn't need to be wide, and two handsful of dirt, possibly, would cover over here—and at the time I got there there was a considerable depression in the dirt; say the dirt line comes up along here, at this point there

was a depression in the dirt of possibly three inches—that is down this way—and probably six or eight inches back—it may
147 or may not have been caused by an explosive placed in this sheltered postition there. In that case, by throwing the switch, we lose a little of the effect there because that would be a sheltered nook in which a man could pack anything in there. To explode that would depend entirely on what the explosive was. As to what it was, I can't exactly say. The action on a piece of iron would be similar on two or three different explosive substances. If it was dynamite in stick form, it would be fired with a mercury cap, and the fuse would be lighted with a match. I have never seen any nitroglycerine exploded. It is used principally in shotting wells, I am pretty sure, and it is discharged by making a heavy discharge which of itself puts off the nitroglycerine. I am not familiar enough with nitroglycerine to say how it is exploded; I never exploded any of it. I was there when this lug was found. Considering Temple in that direction and the track toward Heidenheimer going that way, it was found off in that direction (indicating). If you want the magnetic north and south, it was found to the southeast of the track. It was 241 feet from the track as it was measured. I examined the switch points. Their condition was good. I have examined these switch points down in the yard. That is the same set. I am positive that the point on the right, which is if anything, possibly more used than the left, is the same one that was in use at Silenus, and as the other one is rigidly connected to it, I would suppose it was its twin. The one on the right would be the one that would have the most chance of causing an accident, if it was cocked to the southbound train. Aside from the fact that the lug is gone, that switch stand is practically as good as new. It is part of my duties to know that the track equipment is standard. That is a standard switch stand, and if that lug were replaced we would probably put it back in the track after this trial is over and it would last ten or twelve years. The removal of that lug is the only damage I have noticed to that switch stand. I cannot say whether that damage to the switch stand could have been done simply
148 by a train splitting a switch or not. The general conditions of the track along there are just our average track. It was in safe condition to warrant the running of trains at sixty miles an hour. We had done it at that time and have ever since that time, and I consider it perfectly safe. They even exceed that speed.

Cross-examination.

By Mr. PEARCE:

I recognize the switch point on the right. It is slightly more abraded on the end—slightly more worn than the one on the left. I recognize it from that standpoint, by the marks on it.

I have been in the engineering department for nine years, and have been in charge of work in which thousands of pounds of dynamite have been used. I have seen twelve men killed by it and have been rendered unconscious by an explosion of it. Personally I have never done any dynamiting, but I have been present and

seen quarry and railroad work done. In quarry work, which is very similar to railroad work, grading, they first drill holes to the required depth—these holes can be drilled by hand or by steam or by air, and the next proceeding is to lower into the hole a small charge to spring it and then the hole is loaded with a combination of dynamite and black powder, a fuse is put into the cap and lighted. Dynamite comes in sticks. These sticks are as ordered, from seven-eighths of an inch in diameter to two inches, and they are from six to eight inches long; they come in paraffin paper. As to whether a stick seven-eighths inches in diameter and six inches long is as powerful as one two inches in diameter and eight inches long depends on the composition inside. The object of having them different sizes is on account of the drill. If the composition was the same inside, the larger one would be the more powerful.

149 There is a difference in the case of drilling a seven-eighths inch hole and a two inch. The object of making a larger one is for more power. If you wanted to blow something that would require more power—you would have to use what you could buy locally; possibly in Belton you could buy two brands—possibly in Killeen you could buy one, and possibly further on, none. I have never had any experience with nitroglycerine. I would hate to use that. It is very dangerous to carry with one. It is a subject of discussion whether dynamite acts in all directions or in the line of the least resistence. Some times they claim it acts in the line of the most resistence. That has never been settled. When you put a stick of dynamite on the ground or on a rock and there is an explosion, it tears the rock up and the ground all around and makes a big hole. I did not see any big hole down there that day. The cross tie was not broken in any way. Along by the tie that the switch stand was sitting on, I don't know whether the dirt was clear up here or where—there was no big hole out here—it was just about the same, all except right under here, I mean under the one we are talking about—there was more of a hole there than any where else. That hole was three inches by about eight inches away from the wood. That didn't blow that hole, because if it was dynamited it took place on there. That was just a side issue that some of the force would tear up that cemented gravel. That space in there in about three-fourths of an inch. You can not put a small stick of dynamite, that is the commercial stick in there. You can whittle one off. There would be no danger to whittle it off—it is done every day. If you whittled it off to a half inch you could get about three inches of it under there. I am pretty sure that I could get that in there, and that it would blow that cap off. I don't say that dynamite was used or was placed there—I said it could have been. I would not dynamite a switch. If I had been called upon to put that dynamite in there, I think possibly there would have been stains there, because I can get my finger under

150 there. I cannot say whether you can get a stick of dynamite under there; I didn't try that. I saw this discoloration principally in here and under there. When this is pulled back here it would not cover my hand. There is plenty of room. There is the

mark that I made. If you are going to put your stick of dynamite under here, this does not change it any from the way it was over here. It does not change or effect that any from there over here. Of course, there is more room here than there was in that position. Before this was done, there wasn't much room—just a reasonable amount of room between the bottom of the lug that fits over the rod and this. There is just enough room to fit without binding You can't put anything in there except a fluid.

T. J. COGGAN for the defendant being duly sworn, examined in chief by Mr. Culwell, testified as follows:

In October, 1909, I held the position of special agent with the Gulf, Colorado and Santa Fe Railway Company. The duties of that position were generally to protect company property and look after any depredations and find out what we could about them. That included protection so far as we can, of the track and switches and any depredations committed on them, the same as any others.

I recall the time that No. 17 was in the ditch at Silenus. I went down there on the 7th, the day after the wreck. When I got there, the pitman rod was lying on the ground, disconnected from the switch, and the lug was missing and the points of the switch seemed to be a little damaged. I saw indications that force had been used to remove that lug. I saw on the ground that there was a hole opposite where the missing lug belonged, and there was a certain amount of discoloration on the switch stand. I saw the most of the discoloration in this curved part here. I saw some of it right on here
151 on this head block, that is along the end of the pitman rod; right under here, and right about here was the hole in the ground. That is right directly under the end of the pitman rod.

Nitroglycerine is dynamite with the saw dust removed, as far as I understand it. I have seen the effect of a nitroglycerine explosion on several safes that had been blown up on our railroad. I have experience in running down safe blowers and examining safes that have been blown. We have got one at Kountze now—the safe was blown last month. These safes are built of iron or steel, I presume. I saw that grayish white substance that I explained I saw in the curves of the stand. This is similar to what I have seen on the seven or eight safes that I have seen, the same kind of a residue. This lug could have been blown off by the use of nitroglycerine. To judge from the effects that I have seen, nitroglycerine is a very powerful explosive. I was there when that lug was found. I think they measured the distance from the switch stand, and I believe it was 240 feet. I was there when it was placed over to see whether or not it would fit and whether it came from that place or not. It fit. I suppose there will be a report from nitroglycerine explosion. I have never been present at an explosion. I have heard reports and know that there has been an explosion. Up in the canyon of our road I have heard these reports and they use dynamite up there. These reports are pretty loud.

Cross-examination.

By Mr. PEARCE:

I would not say whether nitroglycerine and dynamite leave the same color or not. I said this was the same color I had seen from nitroglycerine explosions. I cannot say that I have ever seen any dynamite explosions. I think this was a nitroglycerine explosion. It could have been dynamite. I never saw the color that was left by dynamite. I don't know whether I saw the color left by black powder, except on a safe. The kind of discolorations that I saw on safes from explosive is as far as I can remember. The
152 man that had this kind of business to do carried a small bottle. There is a cap and a fuse and that bottle—you could have put that bottle down there any where there—you could have put it anywhere around there. That bottle could have been put there anywhere on the stand and connected with a fuse, and the fuse touched off and the nitroglycerine would have exploded by that concussion. If I was going to do that I would put it as close to that lug as possible. Suppose this lug was there. I could have put that bottle under there. The bottle is about that size. I didn't see the bottle—I don't know its size—they usually use a bottle about that length probably five or six inches long. I have seen about that size bottle. About fifteen years ago we had four men operating in South Texas and these men had several bottles about the same size—something that they can conveniently carry. We have got one in jail now. He had a bottle about the same size. There was one imprisoned in Lake Charles about six months ago. This one in Kountze, we found nitroglycerine on him. We determined that it was nitroglycerine because it was taken out and tested. I hear a man testify on the stand that it was nitroglycerine. That makes two instances that I know of in about twenty years' experience. They happened to both have a small bottle five or six inches long. I have never used nitroglycerine. It is confined in the bottle itself. Just place it on the stand and touch it off with a fuse and a dynamite cap.

I saw some discoloration along on the head block. That is the head block that you have your foot on. The discoloration was right on it, down along the lug on the head block. That looked to me like a burn caused that discoloration. This discoloration that I saw over here was just about the same color as I saw on the base. I saw it on the switch stand right in here where that depression is (indicating) about half way down on the switch stand; right under here—I suppose that would be about an inch, scattered over it; about half way between the top of the switch stand and the bottom of the switch stand. That hole in the ground appeared to be three or four inches across one way, and probably a couple of inches the
153 other way and about two and a half or three inches in depth. There was that much more depression in that particular place than anywhere else around it. From my experience and knowledge of nitroglycerine, if a bottle of nitroglycerine were placed under here and confined in a bottle and exploded, of sufficient power

to tear this off, I cannot tell you whether it would have left any more impression on the ground or about there. I don't know what it would have done — the ground. I should think the effect of dynamite and nitroglycerine would be almost the same. I don't think any man can tell what the effect of dynamite would be; you can't tell with any degree of certainty. I can't say as to whether an explosion of that kind would have left the light burning.

E. C. MILLER for the defendant, being duly sworn, examined in chief by Mr. Culwell, testified as follows:

I am one of the special agents of the Santa Fe; have been with the railroad since August 1st, 1902. I have no objection now to telling how old I am—I am thirty-six. I have lived in Bell County thirty-six years. The duties of the position I hold are to investigate violations of the law in connection with the railway company, protect their interests and their property.

I was down at Silenus after the wreck of train No. 17. I was there on the 7th of October. This wreck occurred on the morning of the 6th of October and I was there on the next morning. I made an examination of the switch stand. When I reached the scene of the wreck, that pittman rod or bridle rod, whatever you call it, was detached from the stand and the lug was gone. I saw evidence that that lug had been removed by force from the way the rivet holding it was sheared. It appeared to be a fresh break, it was bright. There was a whitish gray discoloration on the iron on the switch stand and some on the side of that timber. That discolora-
154 tion that I saw was underneath on this side in here. I would call that the leg on the switch stand—it was underneath on this side. I saw this discoloration under the leg on the base of the switch stand, near the end of the pittman rod, on the steel base, also on the head block and on the pittman rod. That discoloration was a grayish white. I was there when the lug was found. That is the lug that they found there.

Cross-examination.

By Mr. CURTIS:

I went down there about 8 o'clock on the morning of the 7th of October. This accident occurred on the morning of the 6th. That would be about thirty hours after the wreck. I was not there on the morning that the accident happened. I was in San Angelo when it occurred, and I came to Temple as soon as I could. Mr. Coggan nor I, either, were down there the first day. I don't know what changes were made there after the wreck up to the time I got down there.

If a train had split a switch and bent this pittman rod, some person in the interest of the railway company could not have taken a sledge hammer and knocked that cup off with the effect it had there. Along the front of this piece here there is an indication that force had been used. That is not a bruise—it is sheared off—shows that it struck something or that something struck it. It is not battered,

it was all done with one lick. I say it is not battered, it is sheared. If it was hammered it requires a great deal of force; it would have several indentations there. If you hit it one lick it would only leave one impression, but it would probably show signs of being bruised. That is my understanding and impression of it. It is just a question of how many times it is struck as to the impression that will be left on the iron. I was not down there at Silenus a day or so before the wreck and don't know what condition the switch was in. I was not there for about thirty hours afterwards.

155 Redirect examination.

By CULWELL:

If I had obtained any information prior to this wreck that the switch was likely to be tampered with, it would have been my duty to protect it and see that nothing did occur. I did not have any information that lead me to suspect, prior to the date of this accident, that anybody was likely to fool with that switch. I heard Mr. Maxson's testimony a while ago about guarding certain switches in the County. I know about that. I spent fourteen nights at one switch myself, and then I hired other men to watch other switches for as long as three weeks. Now about that time it was reported that a switch over at Barton had been tampered with. A special agent of the Katy told me about that. They did have a train wrecked over there that had gone through a switch. I cannot state positively how long it was after the wreck before we put in a new switch stand over there. There had been nothing done when I got there. I don't know just when it was taken out, but I got there the next day. That lug is bent, it is out of shape.

Recross-examination.

By Mr. CURTIS:

I testified that I did not know what changes had been made there, and now state that nothing had been done. What I mean by that is that when I got there there was no indication that it had been removed from the time the accident occurred until I got there. The ground, except a little place along there, was leveled up. There was no evidence of new work.

R. T. SMITH for the defendant, being duly sworn, examined in chief by Mr. Culwell, testified as follows:

I live in Temple. I am City Engineer of the City of
156 Temple. My occupation in 1909 was City Engineer. I am a civil engineer by profession. I recall the occasion when Santa Fe train No. 17 was wrecked at Silenus. I was down there. I was there at noon, between 12 and 1 o'clock of the next day after the wreck occurred the previous night. I mean by that that if the wreck occurred in the night time, I was there the following day at noon. There had been practically nothing done—very little done while I was down there, towards clearing the wreck. I made an examination of the switch stand. I don't know the names of the parts

of the switch stand, but there was a piece of it that had been torn off that looked like it allowed the switch to be opened. I mean this place down here; that is, one of the lugs. I had never seen that before, but the piece that corresponded to this was blown off. I saw evidence there that force of some kind had been used to remove that lug. In my opinion it was some kind of an explosion. That was my judgment as a civil engineer that some kind of explosive had been used to remove that lug. I am not connected in any way with the Santa Fe railway. I am working for the City of Temple.

Cross-examination.

By Mr. PEARCE:

I went down there between 12 and 1 o'clock. S. N. Strange and John McKay and I believe somebody else went with me. Mr. Strange is now working for the Santa Fe, taking their acknowledgements and notary work. Mr. McKay was, I understood the Santa Fe Claim Agent. I judged from his actions that he was interested, but did not know to what extent. Understand that I don't know that these were indications of an explosion that I saw there. Underneath this piece there was evidence that something had burned, right underneath in here. I don't know whether it was on this side or the other side, but it was somewhere about here. I don't know how much space it covered. It was along this side of it; it was under here, considering that that was originally like this. In
157 reference to where the switch stand was standing then, I saw the burned place right along here. It was a space very nearly the size of the palm of your hand; it was right there. The space in there where that powder burned showed it was nearly as large as the palm of your hand. I don't know whether I could get a space in there nearly as large as in the palm of my hand or not; this was placed around like that when I saw it, if I am not mistaken that was placed with this side that way. There is a space almost as large as the palm of my hand. I don't know whether it was supposed to be in this position when the explosion occurred. Supposing it was, I don't suppose you could get a space as big as the palm of your hand under there. What I saw was a powder burn, I don't know the color. It was not red; it was not white. It was partly black. I do not see any of it on here now. It was the color of a powder burn. I don't know much about colors, but I know that when powder burns it leaves a scar. I don't know whether this was powder or some other explosive. I don't know what color burned powder leaves. I saw that rod there. Standing over by this chair and looking at that rod, I would say that it is bent. I see where that rod fits right there. If you were to lift that rod off of the place where it belongs and lay it down on the ground, and the switch had been left partly propped and an engine, running down here sixty miles an hour should strike it, the force coming this way, would have a tendency to bend that rod. The rod is bent.

Redirect examination.

By Mr. CULWELL.

I don't know whether that is a natural bend that was put there by the men that made it or not, nor do I know whether this sprung place that appeared in the rod was there before the wreck or not. Supposing there was force applied against this pitman rod, that would not be any strain on that lug that is not fastened to it at all.

158 W. E. MAXSON recalled by the defendants, examined in chief by Mr. Culwell, testified as follows:

I was asked by counsel awhile ago if engineers were supposed to know anything about the duties of men in other lines of the service. That is the general idea of the question I was asked. I am familiar with the book of rules of the Santa Fe. These rules prescribe something relative to the duties of an engine man. I have a copy of the book of rules here. That is the same set of rules that was in effect at the time of this wreck. That book contains what is called on the Santa Fe, standard rules. I was asked if in the examination of an engineer for entering the service of the company if I had a copy of the questions that were asked them in regard to the duties which they were supposed to perform, and what questions were asked them with regard to the duties of persons in other departments in the service of the railway company, and I answered that I thought I could get a copy of the examination of engineers. I haven't with me a copy of the examination questions as asked in examining an engineer for service, but all the questions asked are on the rules and regulations of the company, and this is the book of rules and regulations of the operating department and the transportation part of the examination is on these rules. They are asked questions which pertain particularly to the mechanical construction of locomotives and their duties as a machinist in that line. It is necessary for an engineer to be familiar with the book of rules. If he failed to pass examination on this book of rules, he would not be eligible for service.

I would like to read a few general rules first. "General Rules. Section A: This pertains to the rules as assigned, to the safety of passengers and employés and to the protection of property.

Section B: "Employés must be conversant with and obey the rules and special instructions. If any doubt as to their meaning they must apply to the proper authority for an explanation."

159 Section C: "Employés must pass the required examinations."

Section D: "Employés in any service of the train are subject to the rules and regulations and special instructions."

Section E: "Employés must render any assistance in their power in carrying out the rules and special instructions."

In this rule, No. 451, which applies especially to engine men, I find: "Engine men will, in all matters relating to the mechanical department, report to and receive their instructions from the Master Mechanic or his proper representative, but in all matters connected

with the movement of trains, they will receive their instructions from the Trainmaster."

Rule 471: "They must know, so far as possible, that switches are right before attempting to pass or use them, and particularly acquaint themselves with the location of derail switches and know they are right before attempting to pass them."

Rule 457: "They must have in their possession a copy of the rules, time table and a full set of signals in good order and ready for immediate use. Each engine man must be supplied with eight torpedoes, two white lights, two red lights two red flags, four green flags, four green lights and six fuses."

Rule 318: "In case of an extraordinary rain storm or high water, trains must be brought to a stop and a man sent out to examine bridges, culverts and other points likely to be damaged before proceeding. Trains will make stops at all places to ascertain the extent and severity of storms, taking no risks of any danger. They will place their trains upon a siding and remain there until it is safe to proceed."

Rule 319: "When a conductor or engine man discovers anything wrong with the tracks, bridges, tunnels or culverts, which would be likely to cause an accident to a following train, he must not rely wholly on the telegraph or telephone to notify other trains, but must leave a flagman."

160 Rule 464: "They must notice whether watchmen and flagmen are at their posts and report to the Trainmaster any neglect of duty they may observe. They will also report the absence of lights or signals where same should be shown."

Rule 316: "No officer or employé of this company is authorized to request or require any employé to use defective tracks, cars, machinery or appliances of any kind, except at the employés' own risk of injury to their property."

Rule 483: "They will take into consideration that the lives of passengers and trainmen, as well as the property of the company are entrusted to their care, and it is fully expected that they will not only attend to all signals and instructions, but that they will, on all occasions, be vigilent and active themselves, not trusting alone to rules for safety."

Rule 586: This is under the heading of Rules to Section and Bridge Foreman "Unless relieved therefrom, the roadmaster, section foreman, or one or more of their reliable men must pass over their entire section every day, Sundays included, and see that the track is in safe condition. They will especially look at all culverts, cattle guards and banks and see and know that each is in safe condition for the movement of trains."

Rule 592: This is the rule relating to section men, of which engineers must be familiar in their examination.

"During heavy storms of rain or snow, section foremen will at once go over their track to ascertain if the track is safe, and points most likely to be damaged must be given attention so that they may be cleared of ice and snow."

This book of rules and regulations is divided into sections, first

the General Rules, and then the movement of train rules, which is covered by operatives, train dispatchers, agents, yardmasters, conductors, brakemen, engineers, firemen, bridge and track foremen also signal rules regarding flag signals and their significance,
161 inter-locking plants, handling of air as applied to the movement of trains, etc. The contents of all the rules and regulations for the operation of the road by the transportation department is contained in that book, and all men in the train service, so far as it applies to their positions, are required to have the knowledge and pass a satisfactory examination upon this book of rules. I don't think every rule in this book is employed in the engineer's examination form, but such of them as applies to the operation of trains are included, and they are required to pass these examinations. I don't think these sections and rules that I have read are the only matters touching the question that was asked me. I could take time to go over this book and pick them out. There are about seven hundred and eighteen rules. Those that I read have a bearing on the question, and were the ones which I turned to readily. There are many others if I had time to look for them.

WILLIAM STACY for the defendant, being first duly sworn, examined in chief by Mr. Culwell, testified is follows:

I am a locomotive engineer in the service of the Santa Fe. I have been an engineer about fifteen years, I think. I am familiar with the track along about Silenus switch. As an engineer, I know that under normal conditions the tracks and switches are not inspected in the night time; this is only done in the case of storms or wrecks. Under normal conditions, I know they are not inspected in the night time.

Cross-examination.

By Mr. CURTIS:

I know that at stations, like Temple, for instance, the railroad employés in the different departments are passing over the yards and around the switches at all hours of the day and night, and I know that at places where we have stations, like Moody,
162 Heidenheimer, Rogers and other places, that we have a station agent in addition to the railroad men, who are in and about the station, and who know if any outside interference has occurred at that point; there are lots of these stations that don't have any night agent. I don't know where they haven't night agents. Wherever we have an agent, they do that. Track walkers inspect the track between stations on their division; they are used to walk the track between stations. Section men pass over the track between stations on their sections.

R. A. CORDELL for the defendant, being duly sworn, examined in chief by Mr. Culwell, testified as follows:

I live in Temple. I am not connected with the Santa Fe. I recall the time when the Santa Fe passenger train No. 17 was derailed here at Silenus. I went down to the scene of the wreck and I made

an examination of the switch stand. I don't know about finding any part of it gone. I don't understand anything about the switches, but in the examination I found that the switch was broken and could be turned without the use of this lever, could be moved without the use of this lever that was locked, from some piece being blown off it. The part which was blown off, the lug, had been fastened down to the switch. That was gone. From the examination that I made there, I think that force of some kind was used to remove that lug, and I thought so at the time. There was quite a crowd there. I just went down there out of curiosity with my family and I heard that the switch was broken and went up to the switch, and naturally I was interested in the track, and in examining the switch I saw that it was broken, a piece broken off—there is where it had been—it came over the lever and I found that the switch could be turned without throwing this lever. In this examination, I noticed on the base of the switch that there was a burned place, looked like there had been something exploded on it,
163 kind of a black color, grayish color about it. In examining it, I picked up particles of some kind of explosive and mashed them in my finger. They looked like particles of burned powder or dynamite, and I showed them to parties standing by. I actually picked that up. It wasn't dirt that I had in my hand, nor cinders nor gravel, because I would mash them and it would leave the burned smoke or soot on my fingers. I examined the rivet or bolt that held that lug in place to see if it had been freshly broken, and it had.

Cross-examination.

By Mr. PEARCE:

There are things that burn that don't explode. I could not feel it this way and tell that it had exploded. I said it was a burned substance that looked like it was left from an explosion. There are burned substances left from explosions. The sign of an explosion is a good deal different from the sign of a burn. I don't know exactly as I can explain that, but I can take a burned substance on that floor and take and put down some burned powder and you can tell the difference between the two. There was the effect on the metal of an explosion. I can't explain the difference—anybody can tell it, but I can't explain it so anybody else could tell it. I can't tell how loud it exploded from the way it felt; I can't tell whether it exploded in the day time or in the night time from the way it felt, or whether it exploded about 7 o'clock in the evening. I can't tell that. I showed these particles to some of the men and there was some argument about it, considerable argument. I was not doing much of the argument myself—most of it. I picked it up and showed it just out of curiosity. There was a discoloration from this arm all in here and on the sides of the switch. I picked up the powder down here, some of that right at the side of the tie, and some along the edge of the tie down on the ground. I didn't

notice any hole there that was blown out in the ground. I
164 don't know whether there was any there. There wasn't any evidence of anything being blown away, except the lug; there wasn't anything else injured about the switch stand that I know of. I didn't notice whether the light was burning or not. I could not tell whether it was dynamite or nitroglycerine or white or black powder. The color I saw was a grayish white, like any explosive. I saw some Beaumont oil down below there about a hundred yards. I didn't see any around here. I didn't see the switch discolored anywhere except around this part and especially right under here. The discoloration was on this piece here, all over this piece here. I don't say that it was everywhere else except under this; I didn't say it was on that part there. I saw this that day. I will just explain that this piece went over here and there was a nut broken that would permit this piece to be lifted and the switch turned without throwing this lever here and the lever locked.

W. L. FOREMAN for the defendant being duly sworn, examined in chief by Mr. Culwell, testified as follows:

I am an engineer in the service of the Santa Fe. Have been in that service as an engineer since 1903. I am familiar with the track in what is known as the second district on the Santa Fe from Temple south. As an engineer, I fully understand that under normal conditions it is not usual and customary for the railroad company to have track walkers out at night; they only have them out in case of wrecks or wash outs or something like that, only in the day time. I also understand that they do not inspect the switches in the night time under normal conditions. I should think that all engine men know that. An engineer passes an examination on the book of rules; he is required to be familiar with the rules. I do not know of any railroad in this state that, under normal conditions, has track walkers out at night; I can't say about that.

165 Cross-examination.

By Mr. CURTIS:

I don't know that there are other railroads in Texas that don't have track walkers out at night—I could not say on my oath that they don't; I don't know. I don't claim to be familiar with the duties of people in other parts of the service, only those working with me. I don't know the duties of section men, track walkers, master mechanics, bridge foreman, and people in the other parts of the service, only from a study of the book of rules.

Redirect examination.

By Mr. CULWELL:

I know that from a study of the book of rules. From reading it over, I know the general duties of a section man.

Recross-examination.

By Mr. CURTIS:

I am not required to stand the examination on the duties of a section man, and I don't do it. I am not required to be familiar with their duties any more than being familiar with the book of rules.

FRANK HUGHES for the defendant, being sworn, examined in chief by Mr. Culwell, testified as follows:

My home is in Missouri, but I am stopping at the present time in Temple. I am working for W. C. Redeker. That is railroad contracting work, concrete work, work of that description, foundation work.

I recall the occasion when Santa Fe train No. 17 was derailed at Silenus switch. At that time, I was working out here on the river, working for Mr. Redeker, putting in that tunnel for the
166 City; I was working at night. I have had some experience with the use of explosives, not a great deal. I have done that character of work for the construction company for a number of years. I used dynamite principally. I visited the scene of this wreck. I was called upon to go down and look at it. I examined that switch stand; I looked it over. I was there, I presume between 10 and 11 o'clock the morning following the wreck—some time in the forenoon—I don't recollect exactly the hour. I made an examination of the switch stand; my attention was called to it. My experience with explosions against iron is limited. I never had any experience in that line. My work has always been against rocks; I can't express exactly how it appeared, except as to the color. There was not a natural color to the bottom of the stand when I saw it. It appeared to me that there had been some kind of an explosion to cause that clip to be blown off; that was my judgment. My opinion was that that could have been blown off by the use of dynamite or some other explosive. I afterwards made a test to see the effect on iron. I had never had any experience of the kind, and not being familiar with the use of explosives on iron, I went afterwards to the quarry out close to Belton and placed a bar of iron up near the switch stand which happened to be near there—it was a bar an inch and a quarter iron, I presume, and I placed a small quantity of dynamite, probably one-third of a stick, or one fourth of a stick against it. I can't say that it sprung the bar at all, but it gave the same color that this switch stand had when I saw it at Silenus. This is about the extent of my experiment. I can say fully from my experiment, that that confirmed me in my suspicion that an explosive had been used on the switch stand. In my judgment, as far as I could go in my own belief, that discoloration was the result of an explosion. I am not an expert and something of that kind, like going—blowing up that switch is beyond my power. If I was going to do that, I would take my dynamite and open up a stick and get a pail of water and let it soak in the water, and then
167 skim off the liquid from the top and take a piece of paper wrapped up in the manner of a funnel and pour against the

bar. I could not use a stick of dynamite in the small space showed me there. I would take a funnel and pour it in there. It would only take a few drops to do a piece of work like that, that is, reduced in the form of nitroglycerine. It does not take much nitro to clip off a little bur- like that. I am no professional yegg myself, nor a safe blower. I haven't been accused of it yet.

Cross-examination.

By Mr. PIERCE:

No one furnished me the switch stand to experiment with. They have switch stands out at the quarry and that happened to be the nearest one to powder house. I put the dynamite that I used out there up against the bar. I didn't put it up here to get that result. I told them if they would furnish me a switch stand I would make a test. I told them I was going to make a test for my own experience, but if they wanted me to I would do it right, just like it was done down there. They did not furnish it to me. If I had been going to do this, I believe I would have recognized the fact that I couldn't take a stick of dynamite with this small space and accomplish it, so I would have taken a stick of dynamite and reduced it to a liquid in a pail of water, and skimmed it off. I think that is the only way to accomplish this. I don't think that dynamite or black powder would do it. If I had been going to do this, in order to accomplish that result, the way I would have started would have been to take a knife blade and clean this all off underneath, then get a little clay or sticky mud, and put it all around there—a small space is all it need—then I would take a little paper funnel and pour it down in that little curve, confine it in as small a body as I could, then I would have gotten a fuse and set it off. That would have been in here, and would have broken that rivet off, that is the purpose. I can't answer the question as to whether that ex-
168 plosion would have blown this lug out in this direction; I can't say. The pressure would have been down. I don't know what it would have done to that lug. What little I have done with explosives, I always get away to a safe distance. I said I would place dirt or mud or something around there. I found this discoloration right along in there. I could not find it on the bottom. It was some place on the side of the bar; to the best of my recollection it was under there. As well as I can recollect it, that is the plainest point that I could see it. I don't know whether I could have confined the explosive anywhere around there and left the discoloration at the place I saw it and not at other points. I don't know about that; I have seen some peculiar things with dynamite. My opinion is it should have shown plainly on this part here. My opinion is that it should have shown plainer on that than elsewhere. If the testimony shows that this part was discolored and the balance was not, then I don't believe the explosive could have been confined any place to have made the discoloration show here and not there.

O. R. SHERRAR for the defendant, being duly sworn, examined in chief by Mr. Culwell, testified as follows:

I am a locomotive engineer in the service of the Santa Fe; have been in that service five or six years. I am familiar with the duties of an engineer. I understand that under normal conditions the track and switches are not inspected in the night time; this is well understood by train men generally. I am on the Grievance Committee.

Cross-examination.

By Mr. CURTIS:

I don't claim to know all the duties of all the other parties in various departments of the service; we are not required to do that I don't claim to be familiar with the duties of a master mechanic, superintendent, section man or flagman; I am not supposed to be. At places like Temple where they have yards and switches, they have people passing over the yards and switches at all hours of
169 the day to report any defect that occurs; they do not have them at night unless some accident occurs; I don't think they have any track men passing over the Temple yards at night. There are persons in the employ of the company passing over the tracks and yards, but they are not inspectors. It is their duty to observe the general conditions there. At s-ations on the road where station agents are, the agents are in the employ of the company and I suppose would consider it their duty to notice any defect if they saw it. Speaking about the duty of track walkers and section men who work between the stations, the question asked me was relative to whether or not they were employed or were not employed at certain times, and my answer was relative to these parties, whether or not they were employed at night time or day time, or during storm periods, or other periods.

M. G. FLEW for the defendant, being duly sworn, examined in chief by Mr. Culwell, testified as follows:

I am a locomotive engineer in the employ of the Santa Fe and am familiar with the rules of the service. I have been an engineer twenty-two and one-half years. I have been with the Santa Fe twenty-seven years the 16th of July coming. I understand that under normal conditions that the railroad track and switches are not inspected in the night time. That is true, I understand that; that is well understood by all train men.

Cross-examination.

By Mr. CURTIS:

I do not testify on my oath as an honest man what W. T. McGinnis knew of the inspection they made at Silenus at night, I don't know about that.

K. S. HULL for the defendant, being duly sworn, examined in chief by Mr. Culwell, testified as follows:

170 I am Division Superintendent of the Santa Fe at Temple. My district is from Bellville Yards to Cleburne and Temple to San Angelo; Silenus is in my district. I was Division Superintendent at the time of the wreck of train No. 17 at Silenus in October, 1909. I went down to the wreck. I got there some time between 2 and 3 o'clock A. M., I don't know just the exact time, the same night of the wreck. I was there about an hour after the wreck. I made an examination of the switch stand. That is the switch stand here; it was removed from this track, assuming that the wreck occurred early in the morning of October 6th, on the second day, on the 7th—the accident happened on the night of the 5th, and the switch was removed the morning of the 8th. We didn't get the track cleared until the afternoon of the following day, and the passing track was used for handling trains. The next day that switch was taken out, would be the 8th. I examined the switch that night. It was in the same condition that it was that I examined, except that it is not connected with the switch points. So far as the switch is concerned, it is in the same condition. From my inspection of it that night, I found that one of the lugs was missing and the pittman rod was disconnected from the switch stand. The lights were burning and showed a green light, lined up for the main line. With this pittman rod disconnected from the switch stand, the cross-over switch could be moved at will by itself, but you could not operate the track at all by this lever of the switch stand: it was disconnected. I examined the switch itself and the cross-over track. I have seen this track down stairs. It is the same one or an exact duplicate of that switch. In my judgment, it is the same switch. That switch down there was taken up, taken to Temple, and brought from Temple over here to court. That switch down stairs is in identically the same condition that the switch was in that I examined at Silenus immediately after the wreck. I am sure of that because there are some marks on one point that are still on this point. The switch points

171 that I examined that night at the place of the wreck were in first class condition. There was not anything defective about these switch points that would be likely to wreck a train. That train left the track at that point on account of the rod being disconnected from the switch stand which allowed the points to come over and caused the engine to take the cross-over and run into the side track. The switch points didn't have a thing in the world to do with that: they were open about an inch and a half. That was sufficient to wreck a train. If that switch had been opened that much during the day time when other trains were going in the same direction, it would have undoubtedly have wrecked them: if it was in that condition when a hand car went in the same direction, it would have thrown it from the track. I was there when these photographs were taken. In picture No. 4, the track was lined up for the main line at the time this picture was taken. I lined the switch myself. That shows the switch point that was partially open at the time of the wreck when I first got there. That was this point here (indicating)

this rod here was disconnected from the switch stand and allowed these points to open, and this one here was standing about an inch and a half from the rail, which caused the engine to go down over the cross-over. That photograph correctly describes the condition of that switch point that fits up against the main rail at the time that photograph was taken. There has been no change whatever made in that switch point from the time I first went to the wreck up to the time that picture was taken. That picture shows that switch point to fit as close to the rail as it could be made to fit. With that switch point in the position that it appears in that picture, trains could pass safely over that track. That picture was taken the next day after the wreck.

I saw evidence around that switch that night indicating that force had been used to get that lug off. There was on the base of the switch stand a coloring which was effected from an explosion
172 of dynamite or powder, a gray color. I have had experience in the use of explosions. I have been in nearly all departments of railroad service; have been in the bridge and building department, have built bridges, done track work and excavating; I have used explosives; used dynamite. That lug could have been removed by the use of dynamite. There was coloring there—I can't say whether it was dynamite or glycerine—the coloring is about the same, and so is powder, but as a general thing the coloring from black powder is a little darker. An explosion by the use of dynamite makes a loud report. It depends on how you use it—how much you use and where you use it. The only thing that is the matter with that switch is that this lug is off. Suppose that lug was placed back in its proper position, the switch would be the same as a new switch stand—it would be safe to use. As an experienced railroad man, if some machinist was to replace that lug and the company was to tender that switch stand to me, as Division Superintendent, and tell me to use it on my division, I would not hesitate to do so. That damage that I spoke of could not have been done simply by a train splitting a switch.

It is not usual or customary on the Santa Fe railroad, under normal conditions, to have out track walkers at night or to have men out at night to inspect the switches; it has never been customary on that road since my connection with it. I do not know of any railroad in Texas where this is done. I have worked for another road than the Santa Fe—worked for the Fort Worth and Denver on construction several years ago. They didn't have any switches when I was working there—we were building the road.

I think there are five or six blind sidings between Cleburne and Temple. A blind siding is a side track located between stations to be used for the passing of trains generally. We have some blind
173 sidings that was flag stations where we deliver and receive passengers. They have the same switch stand as at other places. That is what I would call the Santa Fe Standard Switch stand; there was no difference in this switch stand at the cross-over at Silenus and what we have anywhere else. Station agents are not supposed, as part of their duties, to inspect switches

in the night time. Prior to the time of this accident, I was not advised of any fact or circumstance that caused me to even suspicion that this switch might be tampered with.

Cross-examination.

By Mr. CURTIS:

It is the duty of a station agent, if he discovers anything wrong about the track or switches, to report it. There are only about four or five places like Silenus between Temple and Cleburne, except where they take on passengers. We would not take on passengers at Silenus, it is not a flag stop for passengers. We do not take on passengers when the train stops there. Railroad men who run from Cleburne and say there are more are mistaken. I can name them. Felton is the first stop out of Temple. There are two switches to the main line and two on the siding. Baggett is between Moody and McGregor about three or four miles from Moody. There are two switches there. Pendell and Bosque—I believe Pendell is a flag stop; Bosque is not a stop; it is just like Silenus, for the meeting of trains. We don't take on passengers there. We have three switches there off of the main line. I did not say I was an experienced man with dynamite; I said I had a good deal of experience; I know how to use it, I have used it without danger to myself. This switch stand costs about fifteen or seventeen dollars. I could take that switch stand and light a dynamite stick and set it off. I don't know whether dynamite was used or not; it might have been nit*or*-glycerine.

Whereupon defendant rested.

174 JOHN TALLEY recalled by the plaintiff, examined by Mr. Pearce, testified as follows:

I made an examination of the switch stand while I was down there. I could not see any evidence that an explosion had been used. I did not find any evidence that any explosive had been used to accomplish this result here. I examined the switch points that is down here in the yard. It don't look like the one I saw that morning. The trucks of some of these cars stayed on the track—went on down the main line and the engine went on the side track; these cars stayed on the main line notwithstanding the cocked switch.

In my opinion, the cause of that wreck was that the engine split that switch, and I think a defective switch point caused it to split the switch.

Cross-examination.

By Mr. CULWELL:

By a defective switch point, I mean the end of that switch rail on the right hand side going south was worn. If the switch was open the switch would have been split without regard to the end of the switch point, and that would have derailed the train; that would have happened without regard to the points and the train

would have gone into the ditch. I say that that don't look like the same switch. This point looks pretty good to me, and I would hate to have rode over the one I saw there the next day. I saw the switch the day following the wreck. I don't know anything about that switch being taken out and stored in Temple, or about it being brought over to Belton for the trial.

Redirect examination.

By Mr. PEARCE:

If this pitman rod had been in its proper place here and also connected with the switch point, and an engine had come
175 down there at a high rate of speed and split the switch, it would have naturally had the effect of bending this rod; it has got to give way somewhere, the point of the rail had got to bend or warp, either upon here or upon the rail.

W. N. THURMAN for the plaintiff, recalled, examined by Mr. Pe-rce, testified as follows:

I have examined the switch point that is down here in the court yard, and it don't look like the same switch point that I saw at Silenus the day of the wreck. I have had some experience with explosives in rock, timber, water—a little of everything. I have had experience with dynamite and blasting powder. I never did use nitroglycerine. As I went up there to this switch there were several people standing there and I walked down to where they were taking some kodak pictures of the wreck, and when I walked back I examined the switch and I could not see any evidence of an explosion at all, I made a careful inspection around where this lug was missing. The ground was not torn up. That is the main thing I noticed; there was no hole in the ground. In my judgment, you could not get a stick of dynamite in on top there. To put nitroglycerine under there, it would be bound to tear this up—tear the tie all to pieces. If you put a stick of dynamite under here to blow that lug 240 feet, it would tear out that ground around there—that is my opinion of an explosion.

The switch light would have been out; a light in fifteen or twenty feet of a jar won't burn. That is my experience in shooting anvils and cannons. In my opinion, that could not have been done with a small explosion—it could not have blown that but a few feet, an explosive could not have been used and produced the results which I found there; it is impossible to blow that 240 feet without tearing that out. I have worked with explosives in rock, in
176 wood, oak stumps; in rock is mostly all I have done with dynamite. I didn't see any evidence at all of dynamite or powder burn discoloration there. If there had been an explosion there of dynamite or powder, it would not leave a sediment that you could pick up and work with your fingers; nitroglycerine is a liquid. It would not have left anything. To have blown that lug that far, it would not have left anything. It is impossible to have done that with black powder. Down where the wreck occurred there was quite

a little of the track torn up—it was the worst torn up track you ever saw. After the train left the track it was pretty badly torn up—broken rails, engine on one side of the track, the tender on the other and everything torn up. It seems to me that there were two or three cars on the track. I don't know whether the cars would have piled up if the air had not been applied. I don't know anything about what it will do if you stop a car suddenly going sixty miles an hour without applying the air. There was one or two cars cross ways of the track. I didn't see any on top of one another.

Cross-examination.

By Mr. CULWELL:

I never used an explosive on iron. This switch stand rests on a plate of iron, it seems to be about a half to three quarters of an inches thick and about six inches long, probably seven inches wide; it looks like it is about eighteen inches long. It would be pretty hard to blow that off in the position it rests on there. A very light explosion could have blown that lug off. The way that bolt is bent indicates that it was blown down the track, that it was blown south. It might not have been blown ten feet. That don't look like the same switch that was down here when I testified at court the last time. It may be the same one that I saw here in March, but it don't look like the one I saw down there. It looks like the same one I saw in March. The point don't look like the same switch
177 that was down there at Silenus at the time of the wreck. The point, to the best of my recollection, had three or four big gaps in it. I was not there when that switch was taken out; I don't know anything about it being taken out and taken to Temple for safe keeping.

J. W. HARDY recalled by the plaintiff, examined by Mr. Curtis, testified as follows:

I have seen the switch point that is down in the courthouse grounds. It don't look like the same one that I saw at Silenus the day after the wreck. I made an examination of the switch stand for indications of an explosion on the day after the wreck. I saw no indications of an explosion; saw no powder burns or discoloration indicative of an explosion. I made an examination for that purpose. The ground not—the ground was not blown up around there.

Cross-examination.

By Mr. CULWELL:

I know something about explosives. Have had something to do with them—with dynamite and nitroglycerine. I never tried an explosive on iron. I don't know what kind of effect would be left on iron from an explosion. This don't look like the same switch that was in the track at Silenus. It is not the one that was in the wreck.

J. E. NEWMAN recalled by the plaintiff, examined by Mr. Curtis, testified as follows:

I have seen the switch point down here on the courthouse grounds. I don't think they are the same points that I saw at Silenus on the day after the wreck, because these down there are good ones and the others were crumpled off on the right flange. I made an ex-
178 amination of the switch stand on the morning after the wreck to see whether an explosive had been used. I did not find any evidence only that lug was gone—not a thing in the world to show that an explosive had been used.

By agreement, the plaintiff read in evidence the testimony of A. F. BENTLY, given on the former trial, which is as follows:

T. J. CARGIN called as a witness on behalf of the defendant, being first duly sworn, examined in chief by Mr. CULWELL, testified as follows:

My name is T. J. Cargin. I live at Temple. I remember the time of the wreck at Selinus when 17 was derailed there. I removed the switch that was there at the point of the wreck, took it to Temple and unloaded it near the old storehouse. It stayed there until we loaded it on a car and took it over to Belton. I have examined that switch down there in the yard, and that is the same switch that I took out of the track at Silenus at the point of this wreck. I know that is the same switch. That is the same switch that I had stored over at Temple before I sent it to Belton; there has been no change in that switch since I took it out of the track over at Silenus.

Cross-examination.

By Mr. PEARCE:

I don't remember the date I took the switch out; I think it was the next day after the wreck; that was the 7th. I don't remember whether it was the morning or the afternoon of the next day. I had my men down there taking up the wreck. They carried it to Temple and put it in the store house—rather out from the platform on the ground—they didn't put it in the storehouse. There was
179 nothing else out there with it; it was left there on the ground exposed to the weather, from October 7th, 1909 until March 1911, out there in the yards at Temple, next to the storehouse, about twenty feet from the platform. I didn't see it every day, but the storehouse have people there every day and they have a night watchman. I have seen it as much as two or three times a day.

Agreement.

It is hereby agreed that the foregoing is a true and complete statement of all the facts adduced upon the trial of the above styled and

numbered cause at the time set out in the caption hereof, and that same shall constitute the statement of facts herein.

A. L. CURTIS &
WINBOURN PEARCE,
Attorneys for Plaintiff.
TERRY, CAVIN & MILLS,
A. H. CULWELL,
JNO. M. FREEMAN,
Attorneys for Defendant.

Approved as statement of facts herein:
JOHN D. ROBINSON, *Judge.*

THE STATE OF TEXAS,
County of Bell:

I, E. E. Upshaw, Clerk of the District Court in and for Bell County, Texas, do hereby certify that the above and foregoing is the Original Statement of Facts, filed in the above numbered and entitled cause, a true copy of which now remains on file in my office.

Given under my hand and seal of office, at Belton, this the 12th day of August, A. D. 1911.

[SEAL.]

E. E. UPSHAW,
Clerk District Court, Bell County, Texas.
By TOM S. SAUNDERS, *Deputy.*

180 Indorsed: Filed August 3rd, 1911. E. E. Upshaw, Clerk District Court, Bell Co. Tex. Tom Saunders. Filed in Court of Civil Appeals 3rd Supreme Judicial District Austin, Texas, Aug. 23, 1911. R. H. Conneriy, Clerk.

181 *Proceedings in Court of Civil Appeals.*

No. 4986.

GULF, COLORADO & SANTA FE RY. CO., Appellant,
vs.
MARY J. MCGINNIS et al., Appellees.

Appeal from the District Court of Bell County.

Opinion.

W. T. McGinnis, a locomotive engineer, while in the discharge of his duty operating an engine drawing a south-bound fast passenger train out of Temple on appellant's road on the night of October 6th, 1909, was fatally injured at Silenus on account of a derailment, and this suit was brought by Mrs. Mary J. McGinnis as administratrix of his estate, for the benefit of herself as surviving wife, and also for the benefit of his four children, three of whom were minors and one a married daughter, Mrs. Nelta Saunders,

alleging that said derailment occurred on account of a defective switch, which appellant had negligently failed to inspect and warn deceased of.

Defendant answered by general demurrer, general denial and specially that at the time of the accident it was engaged in interstate commerce, and that the deceased, as its engineer, was likewise so engaged, which facts were plead in bar of plaintiff's right to recover, on the ground that said suit could not be maintained under the laws of this State. It likewise plead assumed risk, and further denied plaintiff's right to recover on the ground that it exercised reasonable care to keep its road-bed and switch in a reasonably safe condition, and had made frequent inspection of the same, and that this accident was not the result of negligence on its part; that the same occurred in the night when it was not usual or customary to inspect the track; that the track and switch were in good condition on the
182 afternoon before the accident; that the same was occasioned because the switch had been misplaced by some evilly disposed person intent upon mischief.

A jury trial resulted in a verdict and judgment in behalf of plaintiff in the sum of $15,000, which was apportioned by the jury awarading to Mrs. McGinnis as surviving wife the sum of $7,500, and dividing the balance equally among said four children.

Briefly stated, the facts disclose that plaintiff's decedent was the engineer in charge of appellant's southbound passenger train out of Temple on the night of October 5th, 1909, which was derailed at Silenus about 2 o'clock on the morning of the 6th, the engine and tender being thrown from the track on account whereof he received serious injuries, from which he died. It seems that the train was making some sixty miles an hour at the time of the accident, and that the switch light was so set as to indicate a clear main line track, but the switch was partly open and its points worn and defective, on account of which, in railroad parlance, the engine "split the switch," causing the wreck. It further appeared that the pitman or bridle rod was disconnected with the switch stand, and that the lug which fastened or held the same was misplaced. In support of the contention that the switch had been tampered with, evidence was offered to the effect that about dusk on the evening before, a loud report or explosion was heard in the neighborhood of this switch, and that an inspection of the switch and switch-stand shortly after the accident showed discolorations, as though some explosive, such as dynamite, powder or nitroglycerine had been recently discharged thereon. There was no evidence, however, showing that the ground or earth had been disturbed in or about the switch and ties, or any holes torn in the earth, such as would likely have been made by dynamite or other like explosive. The lug spoken of was shown to have been picked up some 240 feet from the track.
183 Controverting this theory there was evidence on the part of plaintiff by persons who had also examined the switch and stand immediately after the accident, to the effect that there was no such discoloration as claimed by witnesses for defendant; and further that the pitman or bridle rod was bent, which indicated that

there was occasioned by the force of the wreck, rather than the cause of it, and that it would not likely have been bent if it had been misplaced prior to the wreck. On the issue as to whether the defendant was guilty of negligence in not inspecting its track and apprising decedent of his danger, evidence was offered showing that about 5:30 o'clock of the afternoon of the day before the accident, that both a handcar and a freight train had passed over this switch in safety. It was also shown that it was not the custom of appellant nor of any other road in this state, to inspect its track or switches in the night time, unless on account of some sudden emergency, such as a storm, which fact was generally known to its employés. No affirmative evidence was offered, however, showing that deceased knew of such custom; but if there had been any tampering with the switch, by explosion, as claimed, this must have occurred about 6 o'clock p. m. which was a period of some eight hours before the accident, during which time it was not shown that any effort had been made to inspect or look after this switch or track. It was further shown on the part of plaintiff by several persons who examined the switch that it was slightly open, estimated to be from three-fourths to half an inch, and that the switch points appeared to have been gradually worn off some ten or twelve inches back; that this wearing away seemed to be old, as evidenced by the rust thereon, and that such conditions would occasion a wreck, by causing the engine to "split" the switch. We have only undertaken to give the salient points of the evidence on the issues thus presented, there being a mass of it on all phases of the case.

It is conceded that this suit was brought under and by virtue of the Federal Employers' Liability Act of April 22nd, 1908, 35
184 Stat. 65 Ch. 149, which was amended April 5th, 1910, 36 Stat. 291, Ch. 143, which provides that suit to recover damages based thereon must be brought by the personal representative of the deceased for the use and benefit of the surviving wife and children of the deceased, or the other beneficiaries, in the absence of such next of kin; for which reason we think that there is no merit in appellant's contention to the effect that the statement in the petition that the suit was brought by Mrs. Mary McGinnis as administratrix of the estate of W. T. McGinnis, deceased, for the use and benefit of herself as surviving wife, &c., showed that it was brought in a dual capacity; nor do we think that the statements therein as to whose benefit it was brought were improper and should be stricken out, as contended by appellant, because we believe that under this statute such allegations were certainly proper, if not necessary.

Nor do we think the court erred in refusing to give appellant's special charge urging that since the proof showed that Mrs. Nelta Saunders was a married woman, and failed to show that she had any expectation of pecuniary assistance from her father, that she was therefore not entitled to recover damages on account of his death; because said statute expressly authorized the suit to be brought by the personal representative for the benefit of the surviving wife and children of the deceased, irrespective of whether they were dependent

upon him, or had the right to expect any pecuniary assistance from him.

By its 5th assignment, appellant asserts that the court erred in refusing to give the following special charge: "The jury is charged that if you believe that the accident was occasioned by the malicious interference with the switch stand by some evilly disposed person in the night time of the night on which the accident occurred, then your verdict should be for the defendant, unless you further find that the defendant knew of such interference, or knew such facts in regard thereto as would put a person of ordinary prudence on
185 inquiry"; insisting by its proposition that the defendant was entitled to an affirmative charge presenting this defense. We think, in the absence of a charge upon this subject, that its refusal would have been error; but the court in its main charge instructed the jury that "If you believe from the evidence that the switch at Silenus was displaced or injured in any manner by explosion or otherwise, by some person intent upon mischief, and that the same caused the accident that resulted in the death of W. T. McGinnis, and that defendant was not negligent if failing to discover the same, then you will find for the defendant." Besides this, the court gave the following special charges, covering this phase of the case: "Special charge No. 8. You are charged that the railway company is in no case the insurer of the safety of its employés; and if you find from the evidence that at the point of the accident the defendant company provided and maintained reasonably safe tracks and switches for the purpose of conducting its business in operating its freight and passenger trains, and that the accident was solely the result of an injury to the switch, caused by some evil minded person, and not through any want of ordinary care on the part of defendant, then if you so find, you will find for the defendant." Special charge No. 5: "You are charged that if you believe from the evidence that it was not usual or customary to inspect the switches or track in the night time, and that there was no circumstance known to the defendant in the exercise of ordinary care to indicate that the switch and track at the place of the accident should have been inspected in the night time, then the defendant would not be guilty of negligence for its failure to so inspect." Special charge No. 4: "If you believe that the deceased knew that it was not usual or customary to have the switch-stand, switches and tracks inspected under normal circumstances in the night time, then you are charged that the deceased assumed all of the risks growing out of such failure to so inspect, and plaintiff cannot
186 recover because of the failure of the railroad company to so inspect." It seems to us that these charges, together with the main charge, fully, clearly and fairly presented this feature of appellant's defense, for which reason the court properly refused to give the special charge requested.

The tenth assignment complains that the court erred in giving the 6th paragraph of its charge to the jury, which is as follows: "Now if you believe from the evidence that the plaintiff Mrs. Mary J. McGinnis, is the duly qualified administratrix of the estate of

W. T. McGinnis, deceased, and was the wife of W. T. McGinnis at the date of his death, and that Lyle McGinnis, Laland McGinnis and Lamar McGinnis were their minor children, and that Nelta Saunders was their married daughter, and if you further believe from the evidence that on or about the 6th day of October, 1909, in Bell County, Texas, the said W. T. McGinnis was in the employment of the defendant as a railway engineer, and as such was engaged in running one of the defendant's locomotives in the operation of one of defendant's passenger trains, and that while so employed in running said passenger train over its line of railway he ran his engine and train into a defective switch at Silenus, thereby causing the accident in question, and which resulted in the death of W. T. McGinnis; and if you further believe from the evidence that the switch point at said place had worn away, broken off and became defective, or, if you find from the evidence that said switch had become loose or open; and if you further find from the evidence that the defendant had failed to inspect its said switch and roadbed and had failed to warn W. T. McGinnis of the dangerous condition thereof (if it was dangerous and defective at the place in question at the time above specified) and if you further find that the defendant was negligent in permitting its switch to be and remain in such defective condition (if you find it was in a defective condition) and if you further find that it failed to exercise ordinary care to inspect said switch and track, and if you find that such failure, if any, was negligence as that term has been heretofore defined, and
187 if you further find that such negligence, if any, was the direct and proximate cause of the death of W. T. McGinnis, then you will find for the plaintiff and assess the damages as hereinafter directed, unless you should find for the defendant under other instructions given you in this charge."

By the first proposition thereunder it is insisted that the same imposed too great a burden upon the defendant, in that under said charge a verdict was warranted against it if the jury should find that the switch was loose or open, without regard to the cause thereof, claiming that since it was not an insurer, its only obligation was to exercise ordinary care to see that the same was in a reasonably safe condition. Second. Because there was no evidence to sustain or warrant the submission of the issue as to the failure of the defendant to inspect the track; and, third, that the mere fact that the switch-point had become defective was not sufficient to render the defendant liable, because such defect, if any, in and of itself was not negligence to deceased, and in order to make the same actionable, it was necessary to show that the defect had existed for such length of time as that the same should have been discovered or could have been discovered by reasonable inspection.

Appellee contends that this charge is not subject to the criticism offered; that the jury were not authorized to find a verdict against the defendant merely because the switch was defective, unless they further found that defendant failed to inspect and was guilty of negligence; and that the same was the direct and proximate cause of the death of the deceased; contending that the evidence established that

the switch had been defective for a long time, as was apparent from the condition of the switch points.

We think appellee is correct in this respect. The charge does not authorize a recovery on the ground that the jury should merely find that there was a defect, unless they further found that the defendant had failed to inspect and was guilty of negligence in so failing, and that this was the proximate cause of the injury. It is true
188 that the burden of proof rested upon the appellees to show negligence, before they were entitled to recover; but in the instant case it will be recalled that the proof did show a derailment; and that the same was occasioned by a defective switch. This being true, it then devolved upon the defendant to show that it was not guilty of negligence in this respect. This could be done by showing that they had exercised ordinary care to inspect the switch, and keep the same in proper condition, but, notwithstanding this, some outsider had so interfered with the same as to cause the accident. In the present case they sought to show that the track was tampered with. This issue was submitted to the jury under proper instructions; and the court likewise in the charge above outlined, permitted a recovery on the part of plaintiff, notwithstanding the switch had been tampered with, provided the jury believed from the evidence that there was a failure on the part of the defendant to exercise ordinary care to inspect the track and protect the plaintiff's decedent from danger. The mere fact that it was not customary on the part of defendant and other railways, to inspect their tracks at night, it seems to us could not be regarded by the court sufficient, as matter of law, to discharge this burden; but the issue remained one of fact for the determination of the jury under appropriate instructions. In I. & G. N. R. R. Co. vs. Johnson, 55 S. W. 772, where a brakeman was killed by the derailment of a train at a defective switch near Austin, plaintiff alleged the failure to exercise proper care by inspection, for the discovery of the defect. The defendant in that case, as in this, claimed that the track and switch at the place of the accident had been tampered with, and that it had exercised due care, and therefore was not responsible. Mr. Chief Justice Key, then Associate Justice, delivering the opinion of the court, said: "While the burden of proving negligence on the part of appellant rested upon appellees, when it was developed by the testimony that the derailment and wreck which resulted in the death of Johnson
189 were caused by an open switch, and that he himself was not at fault, these facts were sufficient to justify a finding of negligence against the appellant, unless it submitted testimony explaining how the switch came to be open, or at least showing that it had exercised proper care to keep the switch and track at that place in safe condition." Citing McCreary vs. Railway, 89 Tex., 168; Washington vs. Railway, 90 Tex., 31. Proceeding the court says: "But leaving out of the case the theory of the switch rod breaking on account of ordinary wear and tear, and conceding that the switch was interfered with and opened by some outside person, for whose conduct appellant was not responsible, still, it was liable if the testimony fails to show that it exercised proper care and diligence to discover

the state of the switch and warn the freight train of the danger. The testimony fails to show any effort by appellant during the six hours intervening between the time Powers' engine passed the switch and the time of the wreck, to ascertain the condition of the switch and track at that point."

In the case of Texas Mexican Railway Co. vs. Mendez, 78 S. W., 25, the train came to a bridge about four o'clock in the morning of May 1st, 1902, and the bridge having been consumed by fire, and the fire having gone completely out, leaving the rails thereon without support, the train was precipitated and plaintiff injured. Plaintiff testified that it was the custom of the section gang to go over and examine their section in the day, but he never saw them do so at night, and did not know whether they did so at night. A train had passed safely over the track the afternoon before. The court said: "As other known conditions, to some extent, existed, in which a fire could originate, the courts cannot arbitrarily say with what frequency inspections ought to have been carried on in order to constitute ordinary care. It is unquestionably of the greatest importance for a railway company to be careful in protecting its employés as well as its passengers through inspection of its road. It will not do, as a matter of law, to say that it may send an inspector
190 over its section, and then abstain from giving it any attention whatever for a considerable time, simply because no necessity is apparent for it. We apprehend that the origin of a defect might be so recent and the circumstances such that the court could say the company had not been negligent in not discovering it in time to prevent the particular accident. But as we have no statute prescribing the railway company's duty as to the frequency of inspection, the question is generally and necessarily one for the jury to determine."

In Thompson vs. G. H. & S. A. Ry. Co., 106 S. W., 912, it is said: "How often inspections of the railroad track must be made depends upon its location, the surrounding country, the character of population, and other circumstances; and, in view of the diversified facts surrounding each case, the sufficiency of such inspection is peculiarly a question of fact for the jury. This rule would not be changed by the fact that the defect in the track was caused by criminals, because the same duty to discover defects would prevail in that case as in the case of defects from any other cause. The duty to exercise at least ordinary care in detecting the defect in the track devolved upon the appellee, regardless of what may have caused the defect; and the question of whether appellee exercised such care was one of fact for the jury. We do not know when the displacement of the rail that derailed the engine took place, only that it occurred sometime prior to the death of Thompson; and it was not for the trial judge to determine that the inspection and watch over the track was sufficient, even though the time of the displacement had been shown, unless it had been such a short interval between the displacement and the accident as to preclude the idea that it could have been discovered by appellee. When it is proved that Thompson was killed through the derailment of his engine by reason of the defect in the track of appellee's railway, appellants

had made out a prima facie case of negligence on the part of appellee, and the burden rested upon it to show that the defect
191 in the track had been caused by the unlawful acts of trespassers, and that it had not been negligent in failing to discover the same. Appellee, and not appellants, should have established the fact of such careful inspection as the place and circumstances demanded, and a failure to fix a time proximately when the trespassers did their work is chargeable to appellee, and not appellant. The rule is thus stated in the case of Marcom vs. Railway, 126 N. C. 200, 35 S. E. 423, by the supreme court of North Carolina, in a suit for damages for the death of a fireman, which occurred through a detailment: "It is the duty of every railroad company to provide and maintain a safe roadbed, and its negligent failure to do so is negligence per se. That while the company is held to a very high degree of care, there must in all cases be some element of negligence to justify a recovery, and it cannot be held responsible for the wanton and malicious acts of an outsider, unless it could, by the exercise of reasonable diligence have prevented the consequences of such act. As the law places upon the company the positive duty of providing a safe track, including the incidental duties of inspection and repair, its unsafe condition, whether admitted or proved, of itself raises the presumption of negligence. This is always the case where there is positive duty imposed by law. The burden of proving such a failure of duty rests upon the plaintiff, but when that fact is proved or admitted, the burden of proving all such facts as are relied upon by the defendant to excuse this failure, rests upon the defendant. Its contention that the accident was caused by someone for whom it was not responsible, and the consequences of whose act it could not have prevented by any reasonable degree of care was an affirmative defense by its very nature carrying with it the burden of proof." Citing in support of the doctrine Railway Co. vs. Gaither, 43 S. W., 266; Williams vs. Lumber Company, 114 La., 805, 38 So., 567; Ry. Co. vs. Kane, 92 Ga., 187, 18 S. E., 18, 22 L. R. A., 315; See also Ry. Co. vs. Bradt, 122 S. W., 59; Ry. Co. vs. Sandlin, 122 S. W., 62.

192 The 12th assignment complains that the court erred in failing to give appellant's special charge defining ordinary care. This charge, we think, was properly refused, (1) because the court had given a correct charge upon the subject; and (2) because the charge was argumentative and upon the weight of evidence.

The remaining assignments, in various respects, assail the evidence as being insufficient to sustain the verdict. We have carefully considered the entire record, in connection with these several assignments; and while there is some evidence tending to show that the switch had been interfered with, and that some care had been exercised for the protection of the track, still, as there was a conflict in the evidence as to both of these issues, we are not inclined to disturb the judgment on this ground, since under appropriate instructions the jury have passed upon these issues; and the trial court, who was in better position than we are to determine the truth or falsity of

the evidence to sustain or defeat the respective contentions, has declined to interfere therewith.

Finding no error in the proceedings of the trial court which will justify us in setting aside its judgment, the same is in all things affirmed.

Affirmed.

B. H. RICE,
Associate Justice.

Filed April 24th, 1912.

(Endorsed:) With App. No. 7828. No. 4986. G. C. & S. F. Ry. Co., Appellant, vs. Mary J. McGinnis et al., Appellees. Appeal from Bell County. Opinion. Affirmed. Filed in Court of Civil Appeals, Third Supreme Judicial District, Austin, Texas. Apr. 24, 1912. R. H. Connerly, Clerk.

193 *Judgment.*

No. 4986.

GULF, COLORADO & SANTA FE RAILWAY COMPANY
vs.
MARY J. MCGINNIS et al.

Appeal from District Court of Bell County.

Opinion by Associate Justice Rice.

This cause came on to be heard on the transcript of the record, and, the same being inspected, because it is the opinion of the court that there was no error in the judgment; it is therefore considered, adjudged and ordered that the judgment of the court below be in all things affirmed; that the appellees Mrs. Mary J. McGinnis, Lyle McGinnis, Lamar McGinnis, Laland McGinnis and Nelta Saunders, wife of X. B. Saunders, do have and recover of and from the appellant, Gulf, Colorado & Santa Fe Railway Company, principal, and its sureties H. O. Stein and Geo. Sealy, the respective amounts adjudged to them by the court below, and all costs in this behalf expended, and this decision be certified below for observance.

Motion for a Rehearing.

No. 4986.

GULF, COLORADO & SANTA FE RAILWAY COMPANY, Appellant,
vs.
MARY J. MCGINNIS et al., Appellees.

Now comes the appellant and files the following as its motion for rehearing herein, representing, as it does, that the court erred as follows:

First.

The court erred in overruling and failing to sustain appellant's first assignment of error and proposition thereunder, which said assignment was as follows: "The court erred in overruling and
194 failing to sustain defendant's first special exception to plaintiffs' second amended petition.

Second.

The court erred in overruling and failing to sustain appellant's second assignment of error and proposition thereunder, which said assignment was as follows: "The court erred in overruling and failing to sustain defendant's second special exception to plaintiffs' second amended petition."

Third.

The court erred in overruling and failing to sustain appellant's third assignment of error, which was as follows: "The court erred in failing and refusing to give special charge No. 10 to the jury, which was as follows: "You are charged that you cannot find any damages in favor of Nelta Saunders, alleged to be a daughter of W. T. McGinnis, because the proof shows that she is a married woman, and is supported by her husband X. B. Saunders, and there is no proof that she had any expectation of any pecuniary assistance from her said father W. T. McGinnis, nor is there any allegation in the petition that she had any expectation of such assistance if her father had lived."

Fourth.

The court erred in overruling and failing to sustain appellant's fourth assignment of error, which was as follows: "The court erred in failing and refusing to set aside the verdict returned herein, and in failing to give the defendant a new trial on the ninth ground of its amended motion therefor, which was as follows:

"In no event should a verdict have been returned in favor of Nelta Saunders. The verdict showed that she was a married woman, who was supported by her husband, and there was no evidence showing, or tending to show, that she received any contributions from her father, or that she would likely receive such contributions in the future. Judgment, therefore, awarding her damages was without evidence to sustain it, and same should be set aside."

195 Fifth.

The court erred in overruling and failing to sustain appellant's fifth assignment of error and the propositions thereunder, said assignment being as follows: "The court erred in failing and refusing to give special charge No. 2, requested by the defendant, which was as follows:

"The jury is charged that if you believe that the accident was occasioned by the malicious interference with the switch-stand by some evilly disposed person in the night time of the night on which the

accident occurred, then your verdict should be for the defendant, unless you further find that the defendant knew of such interference, or knew such facts in regard thereto as would put a person of ordinary prudence on inquiry."

Sixth.

The court erred in overruling and failing to sustain appellant's sixth assignment of error, which was as follows: "The court erred in failing and refusing to set aside the verdict returned herein, and in failing to give the defendant a new trial on the thirteenth ground of its amended motion therefor, which was as follows:

"The verdict of the jury is contrary to the law, and not supported by the evidence herein, for this, that the evidence shows without dispute, that the lug which held the pitman rod, connected with the switch stand, had been forcibly removed, that aside from the fact that the lug was removed, the switch-stand, pitman rod, bridle rod and all other portions of the switch-stand were in good condition and safe for use; that because the lug as above described, had been removed, the pitman rod had been disconnected from the switch-stand, which permitted the switch to be partly open, and that because the switch was partly open, the train was wrecked; that no force applied to the switch or switch points could have removed the lug, and that no train in passing over the track could have done the damage that was done to wit, the forcible removal of the lug, and that the condition of the track and switch had nothing whatever to do with derailment of the train, and in all of these respects the verdict of the jury is against the manifest weight and great preponderance of the evidence."

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Seventh.

The court erred in overruling and failing to sustain appellant's seventh assignment of error, which was as follows: "The court erred in failing and refusing to set aside the verdict returned herein, and in failing to give the defendant a new trial on the fourteenth ground of its amended motion therefor, which was as follows:

"The verdict of the jury is contrary to the law and not supported by the evidence herein for this, that the evidence shows that regular inspections of the switches and tracks were made by the defendant, that trains going in the same direction as the one which was derailed passed safely over this track after five p. m. of October 6th, 1909, that the track, switches and switch-stand *was* in good condition and proper for use for the passage of trains at the time the last train going south passed over the same, that during the night time on the night of which the accident occurred, the lug, which prevented the pitman rod from being removed and disconnected from the switch-stand, was by a great force torn off and the pitman rod disconnected, that this was unknown to the defendant and that it was not in possession of any information which made it necessary to a reasonably prudent person that the switch stand should have been inspected just prior to the passage of passenger train No. 17 over the same: that the switch had been tampered with by some evilly disposed person in the

night time, and for each and all of these reasons the verdict of the jury is against the manifest weight and great preponderance of the testimony."

Eighth.

The court erred in overruling and failing to sustain pppellant's eighth assignment of error, which was as follows: "The court erred in failing and refusing to set aside the verdict returned
197 herein, and in failing to give the defendant a new trial, on the sixteenth ground of its amended motion therefor, which was as follows: "The evidence clearly indicates that the switch-stand at the point in question had been tampered with during the night of the accident by some evilly disposed person, and that but for such tampering of said switch, the train would not have been derailed.

"There are no circumstances in evidence which put the defendant company upon notice that this switch-stand was likely to be tampered with or that it ought to be inspected during that night. The conclusion is irresistible that the switch was in good condition prior to dark of the afternoon before, and for each and all of these reasons the verdict of the jury is against the manifest weight and great preponderance of the testimony."

Ninth.

The court erred in overruling and failing to sustain appellant's ninth assignment of error, which was as follows: "The court erred in failing and refusing to set aside the verdict returned herein, and in failing to give the defendant a new trial on the seventeenth ground of its amended motion therefor, which is as follows: "The evidence shows that the switch-stand in question was a standard switch-stand; that there was none better known to practical railroad men; that the track at that point was laid with 85-pound steel, the roadbed was ballasted and that all parts of the track, switches and switch-stand were perfectly safe for the passage of trains and of this train; that the sole cause of derailment was the fact that the switch was partly open and that it could not have been open without either throwing the switch lever or forcibly removing the pitman rod from its connection with the switch-stand. The evidence shows that the lever was in proper condition and the switch locked, but the lug had been by force removed, which permitted someone to disconnect the pitman rod from the switch-stand, and that when it was dis-
198 connected the switch points were opened sufficiently to derail the train; that this occurred in the night time by an evilly disposed person and under circumstances that could not have been anticipated by the defendant railway company, and for all of these reasons the verdict of the jury is against the manifest weight and great preponderance of the testimony."

Tenth.

The court erred in overruling and failing to sustain appellant's tenth assignment of error and the propositions thereunder, which

said assignment was as follows: "The court erred in giving the sixth paragraph of its charge to the jury, which was as follows:

"Now if you believe from the evidence that the plaintiff Mrs. Mary J. McGinnis is the duly qualified administratrix of the estate of W. T. McGinnis, deceased, and was the wife of W. T. McGinnis at the date of his death, and that Lyle McGinnis, Laland McGinnis and Lamar McGinnis were their minor children, and that Nelta Saunders was their married daughter, and if you further believe from the evidence that on or about the 6th day of October, 1909, in Bell County, Texas, said W. T. McGinnis was in the employment of the defendant as a railway engineer, and as such was engaged in running one of the defendant's locomotives in the operation of one of defendant's passenger trains, and that while so employed in running said passenger train over its line of railway he ran his engine and train into a defective switch at Silenus, thereby causing the accident in question, and which resulted in the death of W. T. McGinnis; and if you further believe from the evidence that the switch-point at said place had worn away, broken off and become defective; or if you find from the evidence that said switch had become loose or open; and if you further find from the evidence that the defendant had failed to inspect its said switch and roadbed, and had failed to warn W. T. McGinnis of the dangerous condition thereof (if it was dangerous and defective at the place in question at the time above specified); and if you further find that the defendant was negligent in permitting its switch to be and re-
199 main in such defective condition (if you find it was in a defective condition); and if you further find that it failed to exercise ordinary care to inspect said switch and track, and if you find that such failure, if any, was negligence as that term has been heretofore defined, and if you further find that such negligence, if any, was the direct and proximate cause of the death of W. T. McGinnis, then you will find for the plaintiff and assess the damages as hereinafter directed, unless you should find for the defendant under other instructions given you in this charge."

Eleventh.

The court erred in overruling and failing to sustain appellant's eleventh assignment of error, which was as follows: "The court erred in failing and refusing to set aside the verdict returned herein, and in failing to give the defendant a new trial on the tenth ground of its amended motion therefor, which was as follows:

"The verdict of the jury is contrary to the law and not supported by the evidence herein, for this, that there is an entire failure in the evidence to show any such negligence on the part of the defendant as would warrant recovery herein. There is no evidence to indicate that *that* defendant had failed to discharge any duty that it owed to the deceased, or that the accident was the result of any negligence chargeable to the defendant, and for these reasons the verdict of the jury is against the manifest weight and great preponderance of the evidence.

Twelfth.

The court erred in overr-ling and failing to sustain appellant's twelfth assignment of error, which was as follows: "The court erred in failing and refusing to give special charge No. 3, asked by the defendant, which was as follows:

"The defendant requests the court to charge the jury as follows: "The law does not define 'ordinary care' further than that the same must be such care as a man of ordinary prudence would exercise under the same or similar circumstances. What would be ordinary care in one case might be gross negligence in another. And the care required of a railway company in inspecting and caring for a switch located in a curve on a down grade, at a point where such switch materially increased the hazard and danger of running a train, might be found by the jury to be much higher than in a case where a switch is a permanent part of the roadbed and is located on a straight road and at grade. The true question for the jury in determining the degree of care required in the matter under consideration is, did the defendant exercise the same care in maintaining its switches at the point of the accident that a person of ordinary prudence and care would have exercised under the same or similar circumstances. If you find that the defendant did exercise such care, then even though the death of engineer McGinnis was due to the accident, still, the plaintiff is not entitled to recover, and if you so find, you will find for defendant."

200

Thirteenth.

The court erred in overruling and failing to sustain appellant's thirteenth assignment of error and the proposition thereunder, which said assignment was as follows: "The court erred in failing and refusing to set aside the verdict returned herein, and in failing to give the defendant a new trial on the eighth ground of its amended motion therefor, which was as follows:

"The court's charge is contradictory in this, that the issues as submitted in the main charge are contradictory to the issues as set up in special charges Nos. four (4) and five (5), which were given by the court at the request of the defendant, and the jury was doubtless misled by the contradictory issues thus submitted and the contrary statements as to the law as so given to them in charge. This tended to confuse the jury and left them no criterion as to the responsibility of the defendant company herein."

201

Fourteenth.

The court erred in overruling and failing to sustain appellant's fourteenth assignment of error, which was as follows: "The court erred in failing and refusing to set aside the verdict returned herein, and in failing to give the defendant a new trial on the tenth ground of its amended motion therefor, which was as follows:

"The verdict of the jury is contrary to the law and not supported by the evidence herein, for this, that there is an entire failure in the evidence to show any such negligence on the part of the defendant

as would warrant recovery herein. There is no evidence to indicate that the defendant had failed to discharge any duty that it owed to the deceased, or that the accident was the result of any negligence chargeable to the defendant, and for these reasons the verdict of the jury is against the manifest weight and great preponderance of the evidence."

Fifteenth.

The court erred in overruling and failing to sustain appellant's fifteenth assignment of error, which was as follows: "The court erred in failing and refusing to set aside the verdict returned herein, and in failing to give the defendant a new trial on the twelfth ground of its amended motion therefor, which was as follows:

"The verdict of the jury is contrary to the law and not supported by the evidence herein for this, that while the plaintiff charged that the track at point of accident was out of repair, and that the switch-points at the place where the train left the track were defective, and that by reason of such defective switch-points the derailment occurred, yet there is a total failure in the evidence to show such defective condition of the switch points as could have caused the accident. The evidence wholly fails to show that the condition of the switch-points had anything whatever to do with the derailment of the train. The evidence shows, without controversy, that if
202 the switch was cocked or partly open, that the train would have been derailed without regard to the condition of the switch points. In other words, there is no evidence which even remotely shows that the condition of the switch points was the proximate cause of the accident, or that the same even contributed to the accident, and in all of these respects, the verdict of the jury is against the manifest weight and great preponderance of the evidence."

Sixteenth.

The court erred in overruling and failing to sustain appellant's sixteenth assignment of error and propositions thereunder, which said assignment was as follows: "The court erred in giving the ninth paragraph of its charge to the jury, which was as follows:

"If you believe from the evidence that the switch at Silenus was displaced or injured in any manner by explosion or otherwise by some person intent upon mischief, and that the same caused the accident that resulted in the death of W. T. McGinnis, and that defendant was not negligent in failing to discover the same, then you will find for the defendant."

Seventeenth.

The court erred in overruling and failing to sustain appellant's seventeenth assignment of error and the propositions thereunder, which said assignment was as follows: "The court erred in giving the eleventh paragraph of its charge to the jury, which was as follows:

"If you find for the plaintiff, the form of your verdict will be 'We, the jury, find for Mrs. Mary J. McGinnis, Administratrix, the sum of — Dollars, as damages, and we apportion the same as follows.' You will then in your verdict apportion such amount be-

tween any or all of the persons for whose benefit this suit has been brought, stating in your verdict how much, if anything, you find for each of said persons."

203

Eighteenth.

The court erred in overruling and failing to sustain appellant's eighteenth assignment of error and the propositions thereunder, which said assignment was as follows: "The court erred in failing and refusing to give special charge No. 1, asked by the defendant, which was as follows: "The jury are charged to return a verdict for the defendant."

Nineteenth.

The court erred in overruling and failing to sustain appellant's nineteenth assignment of error, which was as follows: "The verdict ought to be set aside and new trial granted, because the plaintiff failed to show that the evidence does not show, what was the cause of the accident in question."

Twentieth.

The court erred in overruling and failing to sustain appellant's twentieth assignment of error, which was as follows: "The court erred in failing and refusing to set aside the verdict returned herein, and in failing to give the defendant a new trial on the twelfth ground of its amended motion therefor, which was as follows:

"The verdict of the jury is contrary to the law and not supported by the evidence herein, for this, that while the plaintiff charged that the track at point of accident was out of repair, and that the switch points at the place where the train left the track was defective, and that by reason of such defective switch-points the derailment occurred, yet there is a total failure in the evidence to show such defective condition of the switch-points as could have caused the accident. The evidence wholly fails to show that the condition of the switch-points had anything whatever to do with the derailment of the train. The evidence shows, without controversy, that if the switch was cocked or partly open, that the train would have been derailed without regard to the condition of the switch-points. In other words, there is no evidence which even remotely shows that the condition of the switch points was the proximate cause
204 of the accident, and in all of these respects the verdict of the jury is against the manifest weight and great preponderance of the evidence."

Twenty-first.

The court erred in overruling and failing to sustain appellant's twenty-first assignment of error, which was as follows: "The court erred in failing and refusing to set aside the verdict returned herein, and in failing to give the defendant a new trial on the fifteenth ground of its amended motion therefor, which was as follows:

"The evidence shows, without conflict, that it was not usual or customary under normal conditions to inspect the track, switches and

switch-stands in the night time; that the conditions at the time of this wreck were normal; that the switch in question was located on straight track, on level ground, in a clear country; that there had been no rainfall for sometime previous to the accident which made it necessary or proper to keep track walkers doing service in the night time; that there were no usual circumstances in being which rendered it expedient for the defendant to have the switches and switch-stand inspected in the night time; that it was well known and well understood by all operatives of trains, including the deceased, that under normal conditions, the track, switches and switch-points were not and would not be inspected in the night time; that the deceased knew on the night in question, or it is fair to assume that he knew, that the switch and switch-stand at the point in question had not been inspected later than 6 o'clock on the afternoon before. Under this state of the evidence, the deceased clearly assumed all risks growing out of the failure to inspect the track, switches and switch-stand during that night.

"It was one of the ordinary risks of the service, well known by all engineers, and for each and all of these reasons, the verdict of the jury is against the manifest weight and great preponderance of the testimony."

205 Twenty-second.

The court erred in its finding to the effect that there was no evidence that the deceased knew that it was not customary to inspect railroad switches and track in the night time, as the evidence does affirmatively show, not only that this was well understood by all railroad men, but that the deceased knew it, or must necessarily have known it from all the facts and circumstances connected with his service and employment, and appellant now asks the finding of fact to this effect.

Twenty-three.

There was no evidence to warrant the assumption stated in the court's opinion, that if the switch was tampered with it must have occurred after 6 o'clock p. m. The evidence in this behalf warrants the assumption, that there was an explosion at or near the switch at about dusk or dark, but as to whether or not this is the time that injury to the switch was done, there is no evidence.

Twenty-four.

The court erred in failing to find affirmatively that the switch stand and its appliances had been tampered with after 6 o'clock on the evening prior to the accident that night. There is no evidence, beyond a mere scintilla to controvert this position. The vast weight and preponderance of the evidence shows that the switch stand and appliances had been tampered with as above stated, and appellant now asks an affirmative finding of fact in this behalf, referring as it does in support thereof to the testimony of W. G. Massenberg, record 50-58, H. E. Holmes, 69-72, J. R. Mathis, 72-76, A. F. Mathis, 77-80, R. L. Barton, 101-103, W. L. Alexander, 105-

110; Maynard Robinson, 110-113; W. E. Maxon, 121-137, K. S. Hull, 166-172, and others.

Twenty-five.

The court erred in its conclusion tecitly stated that the injury to the switch-stand, etc. in question could have been occasioned
206 simply by a train running through a split switch. The vast weight and preponderance of the evidence shows that this would have been impossible; in other words, that no such injury to the switch-stand as was actually found to exist could have happened merely by a train running through a switch. We refer to the testimony of the witnesses set out in the twenty-fourth paragraph.

Twenty-six.

It being admitted as it is, that this suit was brought under the Federal Employers' Liability Act, and that the rights and liabilities of the parties are to be determined under and by virtue of that act, *that* the court erred in holding that the deceased did not assume the risk growing out of the failure of the defendant to inspect its switches in the night time. The Assumed Risk statute of Texas, and the rules of law interpreting the same, are wholly inapplicable, and, in fact, have nothing to do with the liability of the defendant herein, as under the Federal Employers' Liability Act the deceased did assume all risk growing out of the failure of the defendant to inspect its track and switches. This was the rule of the common law. The liability of the defendant is predicated under the Federal Employers' Act, which is asserted to be exclusive, and thereunder the defendant has the benefit of all defenses, except those which are specially denied by the act itself, and this risk is and was assumed by the deceased, especially under the evidence in this case.

Twenty-seven.

The court erred in holding that the various charges of the court explaining the law of this case and applying the issues thereto were not contradictory and left the jury without any guide. There is no possible way to harmonize the views of the law as expressed by the trial court in the sixth and ninth paragraphs of its main charge with those expressed in the fifth special charge given at the request of the defendant. These charges were plainly contradictory; that is, the paragraphs in the main charge given were directly contra-
207 dictory to the special charge given. If it was the law as given in charge in the fifth special charge, then the defendant was entitled to a verdict. If said charge did not express the law, yet the jury had no criterion to guide it, as it could not tell what the views of the court was as to the law.

Twenty-eight.

The court erred in holding that under the Federal Liability Act Mrs. Nelta Saunders was entitled to recover. Under the evidence

in this case the Federal Employers' Liability Act is not susceptible to that construction. It did give to her the right to sue but it did not give her the right to recover unless the evidence showed that she had been injured; that she had the right to expect contributions from the deceased, etc. and the evidence did not so show.

Wherefore, appellant presents this, its motion for a rehearing, and represents that the Hon. A. L. Curtis, who resides in Belton, Texas, and the Hon. Winbourne Pearce, who resides in Temple, Texas, are attorneys of record for the appellee and asks for service of this motion in terms of law, and that upon hearing this, its motion, be granted, and that it be afforded the relief prayed for in its original brief.

Respectfully submitted,

TERRY, CAVIN & MILLS.
A. H. CULWELL.

(Endorsed:) Mo. 3915. No. 4986. Gulf, Colorado & Santa Fe Ry. Co. Appellant, vs. Mary J. McGinnis et al., Appellee. Motion for Rehearing. Filed in Court of Civil Appeals 3rd Supreme Judicial District, Austin, Texas, May 6th, 1912. R. H. Connerly, Clerk. Filed in Supreme Court Jun- 6, 1912. F. T. Connerly, Clerk.

208 *Order Overruling Motion for Rehearing.*

Made May 15th, 1912.

Motion 3915, Cause No. 4986.

GULF, COLORADO & SANTA FE RAILWAY COMPANY
vs.
MARY J. MCGINNIS et al.

Appeal from Bell County; Motion for a Rehearing.

The motion is overruled.

209 In the Supreme Court of Texas.

GULF, COLORADO AND SANTA FE RAILWAY COMPANY, Plaintiff in Error,
vs.
MARY J. MCGINNIS, Administratrix, Defendant in Error.

Petition for Writ of Error.

To the Honorable the Supreme Court of Texas:

The Gulf, Colorado and Santa Fe Railway Company respectfully petitions the Court to grant a writ of error directed to the Judges of the Court of Civil Appeals of the Third Supreme Judicial District of

Texas sitting at Austin to review a certain judgment rendered in that Court on the 24th day of April, 1912, whereby the judgment of the District Court of Bell County against your petitioner in favor of the Defendant in error in the total sum of Fifteen Thousand Dollars ($15,000.00) entered on the 8th day of June, 1911 was affirmed, and in which case your petitioner's motion for rehearing in the Court of Civil Appeals was overruled on the 15th day of May, 1912.

This application is based upon the same assignments of error which were presented in the Court of Civil Appeals and the additional propositions which were presented in its motion for rehearing and growing out of the questions raised by the Court of Civil Appeals in its written opinion affirming the judgment:

First Assignment of Error as a Proposition.

The Court of Civil Appeals erred in overruling and failing to sustain plaintiff in error's Twenty-first assignment of error in that Court, which was as follows:

"The Court erred in failing and refusing to set aside the verdict returned herein, and in failing to give the defendant a new trial on the fifteenth ground of its amended motion therefor, which was as follows:

210 "The evidence shows without conflict that it was not usual or customary under normal conditions to inspect the track, switches and switch-stands in the night time; that the conditions at the time of this wreck were normal; that the switch in question was located on straight track; on level ground, in a clear country; that there had been no rainfall for some time previous to the accident which made *it* necessary or proper to keep track walkers doing service in the night time; that there were no usual circumstances in being, which rendered it expedient for the defendant to have the switches and switch-stand inspected in the night time; that it was well known and well understood by all operatives of trains, including the deceased, that under normal conditions, the track, switches and switch-points were not and would not be inspected in the night time; that the deceased knew on the night in question, or it is fair to assume that he knew that the switch and switchstand at the point in question had not been inspected later than 6 o'clock on the afternoon before. Under this state of the evidence, the deceased clearly assumed all risks growing out of the failure to inspect the track, switches and switch-stand during that night.

"It was one of the ordinary risks of the service, well known by all engineers, and for each and all of these reasons the verdict of the jury is against the manifest weight and great preponderance of the testimony."

Second Assignment of Error.

The Court of Civil Appeals erred in overruling and failing to sustain plaintiff in error's Eighteenth assignment of error in that Court, which was as follows:

"The court erred in failing and refusing to give special charge No. 1, asked by the defendant, which was as follows:

"The defendant requests the court to charge the jury as follows: "The jury are charged to return a verdict for the defendant."

First Proposition under Second Assignment.

Under the evidence in this case the deceased assumed the risk of the failure to inspect the switches in the night time.

Third Assignment of Error as a Proposition.

The Court of Civil Appeals ered in holding that under the facts of this case the deceased did not assume the risk of injury growing out of the failure of the Railway Company to inspect the switch in the night time, and in refusing to grant to said Railway Company a rehearing herein based upon the Twenty-sixth ground of its motion for rehearing, which was as follows:

"It being admitted, as it is, that this suit was brought under the Federal Employers' Liability Act, and that the rights and liabilities of the parties are to be determined under and by virtue of that act, then the court erred in holding that the deceased did not assume the risk growing out of the failure of the defendant to inspect its switches in the night time. The Assumed Risk Statute of Texas, and the rules of law interpreting the same, are wholly inapplicable, and, in fact, have nothing to do with the liability of the defendant herein, as under the Federal Employers' Liability Act the deceased did assume all risk growing out of the failure of the defendant to inspect its track and switches. This was the rule of the common law. The liability of the defendant is predicated under the Federal Employers' Act, which is asserted to be exclusive, and thereunder the defendant has the benefit of all defenses, except those which are specifically denied by the act itself, and this risk is and was assumed by the deceased especially under the evidence of this case.

The plaintiff in error will present these three assignments together, as they relate to the same subject.

Statement under First, Second, and Third Assignments.

It appears, without controversy, that the deceased, William T. McGinnis, was a locomotive engineer in charge as such of passenger train No. 17, the engine of which train was derailed at about two o'clock a. m. October 6th, 1909, and by reason of such derailment the said engineer was killed. The plaintiff charged as negligence in the present suit that the derailment occurred on account of a defective switch, which the Railway Company had negligently failed to inspect and to warn deceased thereof. Among other defenses the Railway Company interposed that of assumed risk growing out of its failure to inspect its track and switches in the night time.

All of the above appears from the opinion of the Court of Civil Appeals, and there is no controversy about it.

212 On the trial of this case it was agreed that this train contained cars, passengers, baggage, express and mail that had originated at points outside of the State of Texas, and that were destined to points within and beyond the State of Texas, and that

the train contained passengers, express, etc., that had originated at points within the State of Texas and destined to points within the State of Texas; that some of the cars in the train had originated at Kansas City, Mo. destined for Galveston, Texas; that some of them had originated at St. Louis destined for Galveston, Texas; some had originated at Cleburne, Texas destined for Galveston, Texas; that the deceased took the engine at Cleburne, Texas and was to have released it at Bellville Yard, Texas. (Rec. 39.)

It seems to be conceded by the opinion of the court of Civil Appeals that the question of liability vel non is to be determined under the Federal Employers' Liability Act of April 22nd, 1908, 35th Statute, 8th Chapter, 149.

M. G. Flew, an engineer in the service of the Santa Fe, testified as follows:

"I am a locomotive engineer in the employ of the Santa Fe and am familiar with the rules of the service. I have been an engineer twenty-two and one half years. I have been with the Santa Fe twenty-seven years the 16th of July coming. I understand that under normal conditions that the railroad track and switches are not inspected in the night time. That is true, I understand that; that is well understood by all train men." (Rec. 166, l. 4-1. 11.)

Tom Ormon, an engineer in the service of the Santa Fe, testified as follows:

"It is not a usual and customary thing on the Santa Fe if the weather conditions are good and the track is all right, to have track walkers at night walking the track. Locomotive engineers know that, under normal conditions, there will — no inspection of the tracks and switches at night. As an engineer, I would say that the railroad does not, in normal conditions, have the switches and track and so on inspected at night — not unless they have been doing some work and they think it is necessary to have someone watch them.

The track was in good conditions at the time of the Silenus
213 wreck. It is a fact that when I went over that track that afternoon, I knew that with conditions normal, that that switch would not be inspected in the night time. I knew that section men quit work there at six o'clock in the afternoon. That is a rule unless they are detained to finish up some work. If there was a heavy rain fall and there were bridges and culverts that would be likely to overflow, that is an occasion when they send me out to watch these dangerous places. I have no recollection of anything surrounding this switch that afternoon to indicate to me that it was in an unsafe condition.

"Mr. McGinnis was an old engineer in the service. I was well acquainted with him. I fired for him for quite a while, ran on the same engine with him. Mr. McGinnis was familiar with the rules of the Company, what I would consider familiar with them. He was a practical railroad man." (Rec. 69, l. 3-1. 27.)

W. L. ALEXANDER, General Claim Agent of the Santa Fe, testified as follows:

"It is not at all customary on the Santa Fe or any other railroad that I know anything about, to keep track walkers and inspectors of switches going out over the track at night unless it is something extreme—a heavy rainfall or overflow, something to put them on notice. Aside from that, it is not customary to have men walking the track examining the track at night. No railroad in the State does it. You can't very well operate a railroad without switches. I recollect the character of country down where this switch is located; the track there is straight track; it is not in a cut; it is open country there. That switch is on a straight line of track. I suppose it is slightly down grade going south, but it is a very slight per cent. So far as the eye is concerned, there is practically no grade." (Rec. 107, l. 12 to 1, 25.)

J. C. CURRAN, Road Master, testified as follows:

"I recall the time when No. 17 was derailed at Silenus I had made a daily trip over that track every day for about six months previous to that, and I came over that track on the evening before, on train No. 6, about 2:50, I judge, in the afternoon. I ride on the rear end when I am riding on a train, for the purpose of observing any defects on the line. That is my whole duty. I was riding on the rear end of train No. 6 that afternoon when I went to Silenus. I saw this switch. It was just like any other switch we have on the main line. It was in safe condition for use. It was good for a hundred miles an hour.

"It is customary for section men in this country to work from seven o'clock in the morning in summer time until six o'clock in the evening; in the winter time we quit at half past five and give them half an hour for dinner on account of the days being short In October they quit at six o'clock. It is not customary on any road in
214 this country to send a man out after six o'clock to examine switches or inspect the track except in the event of storms or wash outs—anything to interfere with the passage of trains. There was not any storm or wash out in the vicinity of Silenus on the 5th of October that I know of. There was no occasion for sending a man down that track to examine this switch at all. As roadmaster, I have charge of the track and that includes the switches. These track walkers and section men work under me. If I want them to go down the track I am the one that orders them to go. Suppose that tonight there was to come up a great rain and I was familiar with the track and knew where the weak places were, and I knew from the volume of water that that track would give way, I would take steps to ascertain the condition of the track; I would issue instructions by giving the chief dispatcher orders to send section men out over the track to watch this track. If conditions were as they are today, I would have them stay in the shade, because there would be no need of it. It is not customary on the Santa Fe or any road in Texas that I know anything about to send track walkers or inspectors out during the night to inspect the switches. I have never

known of it. I have come in contact with roadmasters and I have never known of it in this country." (Rec. 114, l. 7-p. 115, l. 22.)

"I examined this switch the evening before, and found it was in A1 condition. I was not keeping time when we went over the switch, but I judge that we might have been making about forty miles an hour going north. I inspected that switch going forty miles an hour. I could see that that lug was not off. I did not see it off. I did not see it on. I have examined this switch just the same as every other roadmaster examines them. The switch points were in perfect condition." (Rec. 116, l. 17-l. 25.)

W. E. MAXSON, General Superintendent, testified as follows:

"It has not been usual or customary under normal conditions, such as existed at that time, to have the switches inspected during the night time. I do not know of any road in Texas where it is customary. I mean by that that such inspection of the track and switches as railroad companies usually and ordinar-y give to these things is in the daytime. Our rules require the section men to pass over the sections at least once during the working hours of the day or to send some one. Of course, if anything is out of order or condition, they have to repair it or protect it with orders, so that the trains will be advised of its condition. The only time we use a night force is in some emergency or in cases of heavy storms; then our section force goes out and protects these things. The only time it is usual or customary for railroads, including the Santa Fe, to have men go over the track at night is in cases of emergency or heavy rainfall, or some other unusual condition." (Rec. 124, l. 14—p. 125, L. 4.)

215 "Prior to the date of this accident, I had received no information, nor did I know of any condition that made me feel that this particular switch was likely to be tampered with. Had I received any information that looked suspicious along that line, as general superintendent I would have requested the superintendent to have his roadmaster give special attention and protection to whatever locality or piece of track the information indicated was in jeopardy.

"I come in frequent and probably daily contact with the train operatives, the engine men, when I am on the road. I am in a position to say that engine men know that under ordinary, normal conditions, the track is not inspected in the night time. They know that. The country at Silenus is an open, rolling country, I should say. The switch is located on tangent track; I mean by that, straight track." (Rec. 125, l. 16—p. 126, l. 4.)

R. ROBINSON, an engineer, testified as follows:

"Under normal conditions I know that it is not usual and customary for the Santa Fe to inspect its tracks and switches in the night time. As an engineer I know that. That is a generally understood fact among train men; They all understand that." (Rec. 129, l. 8-l. 12.)

E. C. MILLER, one of the special officers of the Santa Fe, testified as follows:

"If I had obtained any information prior — this wreck that the switch was likely to be tampered with, it would have been my duty to protect it and see that nothing did occur. I did not have any information that lead me to suspect, prior to the date of this accident, that anybody was likely to fool with that switch." (Rec. 144, l. 19-l. 24.)

WM. STACY, and engineer, testified as follows:

"As an engineer, I know that under normal conditions the tracks and switches are not inspected in the night time; this is only done in the case of storms or wrecks. Under normal conditions, I know they are not inspected in the night time." (Rec. 154, l. 7-l. 11.)

W. L. FOREMAN, and engineer, testified as follows:

"I am an engineer in the service of the Santa Fe. Have been in that service as an engineer since 1903. I am familiar with the track in what is known as the second district on the Santa Fe. from Temple south. As an engineer, I fully understand that under normal conditions it is not usual and customary for the railroad company to have track walkers out at night; they only have them out in case of wrecks or wash outs or something like that, only in the day time. I also understand that they do not inspect the switches in the night time under normal conditions. I should think that all engine men know that. An engineer passes an examination on the book of rules; he is required to be familiar with the rules. I do not know of any railroad in this state that, under normal conditions, has track walkers out at night; I can't say about that." (Rec. 158, l. 15—p. 159, l. 7.)

216 O. R. SHERRAR testified as follows:

"I am a locomotive engineer in the service of the Santa Fe; have been in that service five or six years. I am familiar with the duties of an engineer. I understand that under normal conditions the track and switches are not inspected in the night time; this is well understood by train men generally. I am on the Grievance Committee." (Rec. 164, l. 16-l. 21.)

K. S. HULL, Division Superintendent, testified as follows:

"It is not usual or customary on the Santa Fe railroad, under normal conditions, to have out track walkers at night or to have men out at night to inspect the switches; it has never been customary on that road since my connection with it. I do not know of any railroad in Texas where this is done. I have worked for another road than the Santa Fe—worked for the Fort Worth and Denver on construction several years ago. They didn't have any switches when I was working there—we were building the road." (Rec. 170, l. 16-l. 24.)

Rule 592, governing employees of the Gulf, Colorado and Santa Fe Railway Company, reads as follows:

"During heavy storms of rain or snow, section foremen will at once go over their track to ascertain if the track is safe, and points most likely to be damaged must be given attention so that they may be cleared of ice and snow." (Rec. 152.)

It also appears, without controversy, that the section men had gone over and inspected this track and switch on the late afternoon just preceding the accident that night. It further appears, without controversy, that freight trains going in the same direction as this passenger train was going passed over this track and switch on the late afternoon just preceding the wreck that night. One of such trains passed this switch between 5 and 6 o'clock p. m., and it further appears that if the switch had been cocked at that time the train would have been derailed.

Argument.

There does not appear to be any controversy on the proposition that the liability of the Railway Company, under the facts
217 of this case, must be determined by the Federal Employers' Liability Act. This is conceded by the Court of Civil Appeals, and yet, while so conceding, the assignments presenting the question now under discussion were overruled without reference to the provisions of the Federal Act and authorities receited mostly from Courts in Texas to the effect that it is a question of fact as to whether or not the track should have been inspected in the night time. To raise an issue of fact there must be dispute in the evidence, and so far as this question goes there is no dispute under the evidence. It is established beyond controversy that it was not usual or customary to inspect the switches and track in the night time or after the section crews leave their work at 6 p. m.—that was well understood by all train men, including, as we believe, the deceased. This being true, it is our contention that the failure of the Railway Company to have inspected the switches and track in the night time under normal conditions such as existed on the night *time under normal conditions such as existed on the night* in question is and was one of the risks assumed by the deceased as a train man. Under the Federal Employers' Liability Act there is no change in the rule as to assumed risk, as same existed aforetime, unless it is shown that the Railway Company had violated some statute affecting safety appliances, and the acts of negligence charged in this case did not concern the violation of any safety statute. We therefore contend that the deceased, as a locomotive engineer, assumed all risk growing out of the well known method of conducting the business. He assumed the risk growing out of his knowledge and continuance in the service, and of the failure of the defendant to keep track walkers during the night time. The question as to whether or not a man of ordinary prudence would have continued in
218 the service knowing these conditions is not involved. There is no question presented as to whether or not the defendant

had furnished this man with a track and machinery that was reasonably safe, because it affirmatively appears that this accident was occasioned because of an open switch, which was caused by some overt act committed or which condition has become apparent after the time of day when it was not usual or customary to have those appliances inspected, and the risk of all of which we contend was assumed by the deceased.

Fourth Assignment of Error as a Proposition.

The Court of Civil Appeals erred in overruling and failing to sustain plaintiff in error's Thirteenth assignment of error in that Court, which was as follows:

"The Court erred in failing and refusing to set aside the verdict returned herein, and in failing to give the defendant a new trial on the eighth ground of its amended motion therefor, which was as follows:

"'The Court's charge is contradictory in this, that the issues as submitted in the main charge are contradictory to the issues as set up in special charges numbers four (4) and five (5), which were given by the court at the request of the defendant, and the jury was doubtless misled by the contradictory issues thus submitted and the contrary statements as to the law as so given to them in charge. This tended to confuse the jury and left them no criterion as to the responsibility of the defendant company herein.'"

Statement.

Special Charge No. 5, given at the request of both parties, was as follows:

"You are charged that if you find from the evidence that it was not usual nor customary to inspect the switches or track in the night time and that there was no circumstance to the defendant in the exercise of ordinary care to indicate that the switch and track at place of accident should have been inspected in the night time then the defendant would not be guilty of negligence for its failure to so inspect." (Tr. 23.)

Special Charge No. 4, given at the request of the Defendant, was as follows:

219 "If you believe that the deceased knew that it was not usual nor customary to have the Switch Stands, Switches and Track inspected, under normal circumstances, in the night time, then you are charged that deceased assumed all of the risk growing out of such failure to so inspect, and plaintiff- cannot recover because of the failure of the railroad company to so inspect." (Tr. 23.)

The Sixth paragraph of the court's Main Charge to the jury was as follows:

"Now, if you believe from the evidence that the plaintiff Mrs. Mary J. McGinnis, is the duly qualified administratrix of the estate of W. T. McGinnis, deceased, and was the wife of W. T. McGinnis at the date of his death, and that Lyle McGinnis, Laland McGinnis and Lamar McGinnis were their minor children, and that Nelta

Saunders was their married daughter, and if you further believe from the evidence that on or about the 6th. day of October 1909, in Bell County, Texas, the said W. T. McGinnis was in the employment of the defendant as a railway engineer, and as such was engaged in running one of the defendant's locomotives in the operation of one of defendant's passenger trains, and that while so employed in running said passenger train over its line of railway he ran his engine and train into a defective switch at Silenus, thereby causing the accident in question, and which resulted in the death of W. T. McGinnis; and if you further believe from the evidence that the switch point at said place had worn away, broken off and became defective, or, if you find from the evidence that said switch had become loose or open; And, if you further find from the evidence that the defendant had failed to inspect its said switch and roadbed and had failed to warn W. T. McGinnis of the dangerous condition thereof (if it was dangerous and defective at the place in question at the time above specified), And, if you further find that the defendant was negligent in permitting its switch to be and remain in such defective condition (if you find it was in a defective condition), And, if you further find that it failed to exercise ordinary care to inspect said switches and track, and if you find that such failure, if any, was negligence as that term has been heretofore defined, and if you further find that such negligence, if any, was the direct and proximate cause of the death of W. T. McGinnis, then you will find for the plaintiff and assess the damages as hereinafter directed unless you should find for the defendant under other instructions given you in this charge." (Tr. 18, l. 13—Tr. P. 190, l. 26.)

The ninth paragraph of the Court's Main Charge to the jury was as follows:

"If you believe from the evidence that the switch at Silenus was displaced or injured in any manner by explosion or otherwise by some person intent upon mischief, and that the same caused
220 the accident that resulted in the death of W. T. McGinnis and that defendant was not negligent in failing to discover the same, then you will find for the defendant." (Tr. 20, l. 1-l. 6.)

We also refer to statement appearing under the Seventh Assignment.

First Additional Proposition under Fourth Assignment.

It was the duty of the court to explain to the jury the liability of the defendant in a plain and simple way. The record shows that the court in the sixth paragraph of its charge, warranted finding for the plaintiffs if the defendant had failed to inspect the switch and warn the deceased of its dangerous condition. Under the ninth paragraph, the jury was told that if the switch was injured by explosion or misplaced by some person intent upon mischief, that the defendant would not be responsible, provided it was not negligent in failing to discover the same. The evidence shows that this accident happened at about 2 o'clock in the morning, and it was not usual and customary to inspect switches in the night time; that a train

going it the same direction as the one that was derailed had passed over the switch after 5 o'clock of the evening just prior to the wreck, which clearly indicated that the switch was in good condition at that time. Under the fourth and fifth charges which were given, the jury was directed that if it was not usual or customary to inspect switches in the night time, etc., that the defendant would not be liable. The jury having been, therefore, given contradictory charges as above set out, was at a loss to know what was the law in this case. Either the paragraphs complained of in the main charge was error, or it was error to give the special charges; at all events, there was a plain misdirection as to the law, which was injurious to the defendant.

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Authorities.

Baker vs. Ashe, 80 Tex. 361.
N. T. T. Co. vs. Jamison, 85 S. W. 306.
H. & T. C. vs. Kimbrell, 43 S. W. 1049.
Gonzales vs. Adoue & Lobit, 94 Tex. 125.

Argument.

It seems perfectly plain to us that there was a misdirection as to the law of this case by the Court either in its main charge or in the special charges which were given at the request of the parties. If it was correct to tell the jury, as the Court did in the sixth paragraph of its Charge, to find for the plaintiff if the defendant failed to inspect its switches and failed to warn deceased of its dangerous condition, then it was not correct for the Court to tell the jury, as was done in the fourth Special Charge, that the Defendant would not be liable if the deceased knew that it was not usual to inspect the switch stands and track under normal conditions in the night time, and that under these circumstances he assumed the risk growing out of the failure to so inspect. The same may be said, that is, that there is a contradiction in the rule of liability as stated in the sixth paragraph of the Court's Main Charge to that, which is presented in the fifth Special Charge, which charge was requested by both parties. In other words, if it is the law that the defendant would not be guilty of negligence for its failure to inspect its switches and track in the night time, if it was not usual and customary to so inspect, then the Court was not warranted in submitting the issue, as it did in the sixth paragraph of its charge, that is, for the jury to find whether or not the defendant permitted the switch to get out of repair and failed to warn the deceased. We therefore contend that the charges

222 given by the Court were contradictory and really left the jury no criterion, but left the jury to determine for itself what was the law of the case. We think that the rule was correctly stated in the special charges and the defendant in error is not in position to controvert this position because the Fifth Special Charge was requested by her. It thus seems that the parties to this litigation have agreed that it was not negligence for the Railway Company to fail to inspect the switches in the night time where the evidence

showed, as it did in this case, that it was not usual nor customary to do so. Under that standard, and of which there is an agreement of parties, as above evidenced, it was a wrong to this litigant for the Court to submit the issues that were submitted in the sixth paragraph of its main charge. We do not think that these various charges can be harmonized, and if they cannot be harmonized, then an error of law has been committed, to the prejudice of the Railway Company. It was entitled to have the issues submitted in a plain and unambiguous way. It was entitled to have the jury told in a simple way what the law of the case was, and it seems apparent that this was not done. We therefore submit that, as the court's charge was contradictory, it was error of which we may complain.

Fifth Assignment of Error as a Proposition.

The Court of Civil Appeals erred in overruling and failing to sustain plaintiff in error's Third assignment of error, which was as follows:

"The court erred in failing and refusing to give special charge No. 10 to the jury, which was as follows:

"You are charged that you cannot find any damages in favor of Nelta Saunders, alleged to be a daughter of W. T. McGinnis, because the proof shows that she is a married woman, and is supported by her husband, X. B. Saunders, and there is no proof that she had any expectation of any pecuniary assistance from her said father, W. T. McGinnis, nor is there any allegation in the petition that she had any expecation of such assistance if her father had lievd."

223 Sixth Assignment of Error as a Proposition.

The Court of Civil Appeals erred in overruling and failing to sustain plaintiff in error's Fourth assignment of error in that Court, which was as follows:—

"The Court erred in failing and refusing to set aside the verdict returned herein, and in failing to give the defendant a new trial on the ninth ground of its amended motion therefor, which was as follows:

"'In no event should a verdict have been returned in favor of Nelta Saunders. The evidence showed that she was a married woman, who was supported by her husband, and there was no evidence showing, or tending to show, that she received any contributions from her father, or that she would likely receive such contributions in the future. Judgment, therefore, awarding her damages was without evidence to sustain it, and same should be set aside.'"

These two assignments relating as they do to the same subject will be treated together.

Statement under Fifth and Sixth Assignments.

Special Charge No. 10, which was asked by the plaintiff in error and refused, is correctly set out in the Fifth assignment. (Tr. 27.)

The Ninth ground of the amended motion for a new trial is correctly set out in the Sixth assignment. (Tr. 30.)

Mrs. MARY J. MCGINNIS testified as follows:

"Mr. McGinnis and I had been married twenty-five years the coming December after he was hurt. We had four children. Mrs. Saunders is my daughter; she is sitting here; she is twenty two years of age now. At the time of Mr. McGinnis' death she was 20." (Rec. p. 37, l. 7—l. 11.)

"My oldest daughter had been married four years. Her husband supports her." (Rec. 39, l. 2 and l. 3.) (By oldest daughter she meant Mrs. Saunders, which is verified by her reference to the other children and by the allegations in plaintiff's petition.)

There was no allegation in plaintiff's petition that Mrs. Saunders had any expectation of realizing anything in the future from
224 her father, and there was nothing in any of the proof to indicate that she has any such expectation. Judgment was rendered in favor of Mrs. Saunders for $1875.00. (Tr. 27.)

Argument.

Compensation for the loss sustained was all that the plaintiffs were entitled to if liability was established, and so far as the child, Mrs. Saunders, is concerned, her only measure of recovery would be what she could reasonably expect by way of benefits or contributions in the future from her father. The jury was not authorized to surmise and guess, and the evidence affirmatively shows that her husband supported her, and no effort was made to show that she had the slightest expectation of receiving any financial aid from her father in the future. The Court of Civil Appeals overruled these assignments because the statute had authorized the suit to be brought for the benefit of the surviving wife and children of the deceased irrespective of whether they had right to expect pecuniary assistance from him or not. It is true that the statute did authorize the suit to be brought but there is nothing in the statute which warrants the inference that a recovery would be warranted where the proof failed to show that a loss was sustained. A statute may authorize a certain person to file suit, but even so it is necessary that the person who brings the suit must not only show that they have the right to bring it but that they have also been financially hurt through the negligence of the defendant. The death statute in Texas concerning railroads has always authorized suit by the widow and children of deceased, but it has, so far as we are advised, uniformly been held that adult children cannot recover unless they show an expectation of future benefits from
225 the deceased, and we submit that the fact that the statute authorized the administrator to maintain the suit for the benefit of Mrs. Saunders did not authorize a recovery by Mrs. Saunders, unless she showed that she had an expectation of receiving benefits from her father in the future, and as there was a failure to so show we contend that a recovery in her behalf was not warranted. There is no material difference in the two statutes upon this subject, and the basis of recovery is the same, and we insist that the reasons assigned by the Court of Civil Appeals for overruling these assignments cannot be sustained.

Seventh Assignment of Error as a Proposition.

The Court of Civil Appeals erred in overruling and failing to sustain plaintiff in error's Fifth assignment of error in that Court, which was as follows:

"The Court erred in failing and refusing to give special charge No. 2, requested by the defendant, which was as follows:

"'The jury is charged that if you believe that the accident was occasioned by the malicious interference with the switch-stand by some evilly disposed person in the night time of the night on which the accident occurred, then your verdict should be for the defendant, unless you further find that the defendant knew of such interference or knew such facts in regard thereto as would put a person of ordinary prudence on inquiry.'"

First Additional Proposition under Seventh Assignment.

The defendant was entitled to an affirmative charge, presenting in an affirmative way its defense, having evidence to sustain it, and there was evidence sustaining the affirmative of the issue, called to the court's attention in this charge and which was not presented by the court in its charge to the jury.

226 Second Additional Proposition under Seventh Assignment.

If the accident in question was the result of malicious interference with the switch-stand on the night of the accident, and the defendant had neither knowledge thereof, nor facts which made it necessary for it, in the proper discharge of its duties, to make inquiry, then it would not be liable, and the jury should have been so told, and the issue so presenting that question was raised by the evidence in this case.

Statement.

The special charge set out in this assignment was asked and refused. (Tr. 21.)

W. G. Massenburg testified as follows:

"In October, of 1909, I occupied the position of division engineer of the Santa Fe on the Beaumont Division. I was on train No. 218, going north at the time of the Silenus wreck, and we reached that point a short while after the wreck. I got to the wreck some time between two and three o'clock in the morning. When I got there, I examined the track to see, if possible, what caused the wreck. I made an examination of the switch and the switch-stand. I found the switch was slightly cocked, and the pitman rod was disconnected from the switch-stand and the lug on the stand, which is supposed to hold the pitman rod in place, was missing. I saw that the rivet had been broken off that held the lug. That which you hold in your hand is what we call the lug. That lug is not in its proper shape; it is bent. The proper shape of the lug is that this piece that is pointed in should be turned down, more like that other one is. This lug should be in the same shape as the one that is fastened on—they should be in the same shape. They are both fastened to the switch-

stand in the same way by some kind of a nut or bolt, this same fastening as on the one that is in place. I examined the nut or rivet, and it was a fresh break, clearn, white metal, indicating that it had been recently broken. With that lug securely fastened in its proper position, it is not possible to remove that pitman rod, or rather, disconnect it from the switch; in other words, before that pitman rod could be disconnected, you would have to remove the lug, and that lug was removed. No possible pressure that would come to it would be transmitted under that pitman bar, which is horizontal. This switch-stand is about seven feet from the nearest rail. This pitman rod is just about six feet long, and the bridle rod comes out about a foot from the rail. The bridle rod is the connection between the grade rail, and this rod that is shown in the picture is the pitman rod. The rod that is fastened onto the bridle rod and extends along the track—under the track—is called the bridle
227 rod, or sometimes it is referred to as the throw rod, and the bridle rod is referred to as the head rod.

"The lights were burning in the switch. They showed a green light. That indicated a clear track. There was a wreck on the track. The lights of the switch-stand and the switch track showed that the switch was set for the main line, and the pitman rod was disconnected, and the switch was partly cocked. I examined the switch-point I have seen the switch-points that are down in the court-house yard. I cannot identify them positively, but to all appearances, that is the same set.

(At the request of the defendant, at this point the jury was permitted to go down into the court yard and examine the switch points.)

"This track is setting the same way that the track is at that place. The side-track being on the south, this switch-point here would have to be cocked to wreck a southbound train, and this other rail did not have anything to do with the wrecking of the south-bound train. This would have to be about five inches from the main line rail. This one don't have anything to do with it, with the wrecking of a train. This one here was about an inch or possibly an inch and a quarter from the rail. From an examination of the switch-point, it looks like a good point, and not a defective point. From an examination of it for twelve inches, it appears to be perfectly straight. The rod under here is what you call the bridle rod. That switch-stand that is upstairs is fitted in here and by means of a lever that is attached to the switch-stand, you can throw the switch. That is a guard rail on the inside, and if they didn't throw together, you would have to bend this rail. When that switch is set, it would be a part of the main line. This rail on this side is supposed to fit up close. The flange of the wheel runs on the inside of the rail. A car, coming in contact with the rail—coming along here—would not strike that switch at all if this point fitted up close. That switch was cocked—if the switch was cocked, this would not go on the inside. This piece of cross-tie has been sawed off. That is what is usually known as the head block, and is the main line tie extended to the switch-stand. It is shown on picture No. 4 to be a long tie that has been sawed off.

"It is not possible to put that light on the top of the switch-stand wrong—the light is made to fit only one way, and you can't put it on any other way. The only way you can possibly put that light on so that the light will show red and the track a clear track at the same time, would be to have somebody make another light with a different lens, putting the red light where green is supposed to be in the lantern. You can't use that light as it is without some changes to make it show correctly. The damage that I found there to this switch-stand—the lug off and the bolt broken that held it in place—could not have been occasioned just by reason of a train splitting that switch. I was not there when that lug was found. The switch lever was in the socket, and the switch lock was locked. That was in its proper position for the clear track.

228 "I spell my name M-a-s-s-e-n-b-u-r-g. It is not a matter without much difficulty to break a switch lug. If you will notice the number of rivets that go through it—it is a matter of difficulty, and long experience has proved that a lug like that is very hard to break. Sometimes they break the switchboard and sometimes they break the lug, I guess. I suppose that all railroad men know that you can take a hammer or bar and break a lug. A person could take a hammer or a bar and break a lug, if they wanted to interfere with the switch; then they could take this switch light off and set it up on one of these and wire it so it would appear *that* with a green light—you could set it on one and swing it and wire it there, but when we examined the switch we did not find any wire there. Anything could be done. There would be a good many conditions governing that, the ability of a man to climb up there—. This light wasn't out; it hadn't received sufficient concussion or shock or jar to put it out; it was still burning in its proper place for a clear track.

I said it was between two and three o'clock in the morning when I reached Silenus. I was asleep when the train stopped, and then I awoke and got out. It was just after I got out that I first noticed the switch-point and the pitman rod disconnected. I am not sure whether that was 2 or 3 o'clock—I didn't look to see what time it was; it was some time after the accident happened, probably an hour. I don't know what had been done to the switch during that time, if anything. I was not there when Mr. Harris examined that switch-point and noticed the bend *i*t it, and the abrasion all along on the inside of it. I did not find any such condition as that on this point down there. I don't know what conditions the conductor found there. I found a little piece broken on the inside of the point. I examined it at night, and I can't say as to whether it was old and rusty or a new abrasion at the time I saw it, whether there were any indications of rust on it or not, because I did not examine it that close at that particular time. That little abrasion on that point might have been struck that night. I never saw one that went through a wreck look as good as that. I don't think that train was going sixty miles and hour. I was judging from the rate of the train, which is only about twenty-eight miles an hour, and sixty

with the stops is too much. If the conductor says sixty I would not say that he is mistaken; I am giving you a personal opinion.

"If this lug was off and if the pitman rod was disconnected and the switch was partly opened, then the train going through it, going south, splitting the switch, would not have any occasion to bend the point; they could move the point without bending it, if the pitman rod was disconnected, so if the switch-point was bent, it would be an indication that it had been struck, and that there was—there would not necessarily become resistance holding it; its own weight would be resistance enough the indicate that it had been struck.

229 "I came into Temple that night when the train came in. I don't remember just what time that was. I haven't stopped at Silenus since then, haven't been there since. That is all I noticed there that night, that the pitman rod was disconnected when I inspected it. I suppose it was before three o'clock. I don't know when No. 218 got there. I was asleep when the train stopped, but I got up. I was dressed. I was riding in the Pullman and was going to get off at Temple, in fact, I got ready to get off and was lying down in the berth. It was still lying down in the berth when the train reached Silenus.

"I did not see Engineer McGinnis there; didn't pay any attention to him; didn't look for him. I was told that they had all been well cared for, and the Pullman man said they had furnished some blankets and things to take care of them with.

"I crawled under the car under the rear end of the last sleeper. I had some matches and paper with me. I examined only one switch at that point before I found the one where the train ran off. There are four or five, or maybe six, switches at that point, but a man that is accustomed to wrecks will know where to look for them. The reason I examined the switch-points was that I found them in going back to the rear end of the train. I found the switch-points and the switch there in going back to the front of the car where I stopped, which was off of the track and the rear of the car was on the track, and that was the reason that there was—that I knew there was something between that that caused the derailment. When I stopped and found that, I was on the opposite side of the switch stand. A train would not necessarily be more likely to derail at a switch than at any other point; somebody might have ditched it, put an obstruction on the track. If you want me to say there is more or less risk in the track on account of the switches, I will say there is. I did not find where the track was broken. I found where the track was broken down in the wreck ahead of the switch, that is, south of the switch; that was by the engine and the train striking it. The switch showed a clear track for the main line. The points were cocked. That is partly open; it was open about an inch or an inch and a quarter. In changing the switch from an open main line track to set it for the side track, the pitman rod moves just the same amount that the point shoves, about five inches on that eighty-five pound rail, so if a man were to disconnect the pitman rod to open it, he could open it as much as five inches—to make the full throw of the switch he could throw it from the main line to the passing track. After

it gets past an inch, it is my opinion that it would do as much damage as if open two or three or more inches. This was open about an inch and a quarter. I did not measure. If it was only open one-quarter, or three-eight-s or one half an inch, it would not be as likely to wreck a train as if open two or three inches. If a person intentionally wanted to set that switch and had the pitman rod disconnected, it would be just as easy to open it two or three inches only he would have to pull just a little bit longer to open it three
230 inches than a half inch. If he was a good strong man, it probably would not make any difference with him.

"All that is necessary to cause a derailment is to throw that switch so that the flange of the wheel will catch in between the point and the main line rail; that will produce a derailment. If a half inch will cause that flange to go in there, a half inch is enough, if it will take a half inch. The flange on the wheels on one of these twelve hundred class engines is about an inch and a quarter wide." (Rec. 50 to pg. 58, 1-9.)

L. W. MUELLER, on behalf of the defendant, testified as follows:

"I am a fireman for the Santa Fe. I was firing for the company in October, 1909. I remember about this wreck of Number Seventeen at Silenus. I know where that switch was located there. I went south over that switch that afternoon; I don't recall the exact time, but it was somewhere between 4:30 and 5:30—I don't recall the exact time. I went south on an extra freight train. I was going in the same direction as the train that was afterwards wrecked. I passed this switch. We had no trouble with it; it was apparently all right. If the switch had been cocked at the time that I went over it, it most assuredly would have wrecked that train, but we did not have any trouble there; we didn't stop there. We didn't go in the ditch. My engineer was Tom Orman. I think he is here; I saw him a while ago. There was nothing about that switch at the time that I went over it that called my attention to its being out of order in any way. I believe I had engine 765 or 764—765. That was late in the afternoon of October 5th.

"I have run over the road a good part of my time in the service of the company, that is, I am a good part of my time on my run. My attention was first called to the occasion of my having been over this track on the afternoon of the 5th of October sometime shortly after breakfast the next morning. I heard about the wreck. We don't keep any record showing the time that we made and each station and the trains that we passed. The engine men don't, and the train crew don't either. That is kept in the office. There is no member of our train crew running south, for instance, and passing a north bound train at Cameron and another at Milano and another at Bellville, having a record of the trains which we passed going north unless there was some delay or a delay report. I don't know what other trains passed over that track going north or south on the afternoon of October 5th and night of October 5th. That hasn't anything to do with my part of the business and therefore I kept no record of it. I don't recall, personally, whether we met any trains

going north that afternoon or not; we hardly ever go out that we don't pass some somewhere but I don't recall. As a matter of fact, freight trains are frequently passing over that track going in either direction. In a busy time like October we would have more freight trains passing than passenger trains; we do that most of the time. There are more freight trains than passenger trains. Silenus is frequently used for trains to take the side track for the passage
231 of other trains; that is what it is there for. We have a number of sidings with six switches like Silenus between Temple and Galveston. There is no such place as Silenus between Rogers and Heidenheimer. I know one that we call Arion, that is like it: same kind of a place exactly, about 4 or 5 miles or 6 or 7 miles this side of Milano. It is exactly the same kind of a station. No station there—it is just exactly the same kind, same as Silenus, with six switches. I don't believe there is another one between there and Galveston. I don't know anything about the first division; I don't work down there. Temple is a division point of the road. These are the only two on that division that have that number of switches that are not in towns. These are the only ones that I know of on that division, that are between stations, between Bellville and Temple. Milano is the junction point with the I. & G. N. and Temple is a freight division point, I believe they call it. Silenus is frequently used for the passing of trains; that is the only motive they had in putting it in there. That is what it is made for. In order for Silenus to be used for the passing of trains, one train most assuredly has to take the side track, then in order for it to get back on the main line track it has to pass through the switches. That is the only practical way for it to get back onto the main line track. If a train were pulled through that switch without throwing it, it would leave it in a defective, dangerous condition. In this particular switch, if a man would back out or head out of this switch, he would have to be moving northward to damage that switch. If that were done, that would leave it so that a train coming south would be likely to split the switch; it surely would not go up there at a high rate of speed. I don't know how many trains or switches side tracked there on the afternoon or night of October 5th. I have no record of them.

"Between Temple and Cleburne we have one intermediate station such as Silenus, at Felton. It is not exactly built like that, but there is six switches. We have one at Manhattan. That is the only one that is built exactly like that. Felton is about three or four miles north of Temple, and that one is not built exactly like this other one, either. That is not used in connection with the switch yards. It is used for a passing track for the passing of trains on the other side of Temple, on the north side of Temple. It is put in there for the meeting and passing of trains. I don't know whether, under the regulations of the Railroad Commission, it is necessary for us to maintain points like that for the meeting of trains. Manhattan is about half way between Cleburne and Valley Mills. There is one other track like that this side of Cleburne about four or five miles, not built in the same way. These other two places are the only two places of that character between Temple and Cleburne—built in the

same way, between towns. There are some at regular stations having a regular station agent. At some places we have a station agent. At places like Pendletonville, Moody and McGregor we have station agents." (Record, 62, to P. 66—L. 6.)

232 J. R. MATHIS, on behalf of the defendant, testified as follows:

"My name is J. R. Mathis. I live about three miles south of Temple, near Silenus Switch. I call it three miles from Temple. The switch where this accident happened is about four or five hundred yards from where I live. I live east of the switch; my house is east of the switch.

"I remember the occurrence of a wreck at Silenus in which the engineer, Mr. McGinnis, lost his life On the evening of the day before this wreck happened at night, I was picking cotton. I quit a little before sundown, is my recollection, and went to the house and commenced feeding. I was on the east side of my house then—the house was between me and the switch. I was feeding the stock. It was about sundown. My attention was attracted by something unusual—there was a large report of some kind that drew my attention. I have heard both guns and dynamite: and have heard dynamite go off and have heard guns go off. It seemed to me if that was a gnn it was the largest gun I ever heard. It was a kind of a muffled sound. I did not have time to pay much attention to that at the time because the stock got scared at it and I didn't pay much attention to tell whether it was a gun shot or a blast. I could not tell what direction that sound came from because I was stooped over shucking an ear of corn out of a basket and I couldn't hear. I was too close to the house. I didn't hear anything more that night that attracted my attention. This was about dark. My attention was not attracted again that night or the next morning towards that sound that I had heard. I don't think the fact that there had been a blast or an explosion there occurred to me any more than when I went to the house my wife spoke to me of a big report.

"I could see the accident from my house. It was some time the next morning, I reckon about sunup, when I first saw it. I saw there had been an accident down there; I seen there was something the matter with the train down there. I went down to the place probably about sunup—I don't recollect now exactly what time. There were some people at the switch when I went there. They said that the switch was tore up: I didn't understand the switch. I found there had been an accident there, the railroad was all torn up. The engine was on one side, and the track was all torn up where we had to step across. I didn't notice the switch as I passed down. I was looking at the cars. I afterwards came back up there and looked at the switch stand. My recollection is that this rod that runs out here was off. I think it was off and lying out in that way. There was a piece missing from the switch stand. I don't remember seeing that piece at that time. I think that rod was off at the time—that is my recollection. There was a broken bolt. I don't know whether I could tell the jury where it was, but I think this is the bolt there.

At that time that appeared to be a fresh break. I think this is the bolt that was broken

233 "My eyesight is bad, but some of the men said right there it looked like there had been something burned. I seen something there that looked as though something might have been burned. I have seen the effect of an explosion of dynamite on iron. As I told you, my eyesight is bad, and I could just discern the different color. It was discolored; it looked to me as though there had been a flash of something burned. Several of us went down there together; my boys went with me. My boys are here; there are four of them.

"I stated that on the afternoon of the 5th of October I heard some kind of a report, of a gun, or some explosive. It was about dark when I heard that. I can't tell you whether it was before or after seven o'clock. It was what I could call good and dark—you could not see a person any distance. I don't recollect whether it was as dark as it could be or not; it was about dark. I don't recollect the date, of course. I didn't hear any report that night at *night* o'clock after that; I didn't hear any report that night just about thirty minutes before the train was wrecked. I did not hear any other report there that night. I did not hear any explosion down there just before the train was wrecked. It appeared to be a kind of a muffled sound. I think what caused it to be muffled to me was being so close to the barn; I think that was the cause of it, because I was so close to the barn. I would think if you discharge an explosive in the open air it would have a muffled sound, but I don't really understand about the muffled sound. I was close to the barn when I heard it. Mr. Rose lived east from me. I lived east from Silenus; Silenus is west of me, and Mr. Rose was east of me. I didn't go down until the next morning. When I went down there the track was torn up. The rail all along was torn up; I think—I suppose that was where the train had struck it after leaving the track; it commenced right at the switch, is my recollection. I can't give you any information about its commencing some little distance before it went off the track and that it merely cut the cross ties. The track that I saw torn up was torn by the train after it went off of the rail.

"I was standing there looking at the switch stand when I heard some people talking; I don't know whether there were a number of railroad men there or not. I didn't know the crowd at all—didn't know the railroad people. I knew Mr. Miller and Mr. Coggan. I didn't know Mr. McKay until that day. I just noticed that there was a little different color along on the inside of this. I didn't notice that there was white or gray all around here. The discoloration that I saw on the inside was kind of a light color. I don't know of my own personal knowledge what caused that.

"I am not employed in any way with the Santa Fe railway company. My occupation is farming." (Record, p. 74—L. 13 to p. 78 L. 17.)

A. F. MATHIS, on behalf of the defendant, testified as follows:

234 "My name is A. F. Mathis—Frank. My business is farming. I am not employed in any capacity by the railroad. I live near Silenus, about two miles and a half south of Temple, Bell County. I am acquainted with the country and the roads around Silenus switch. I live about three or four hundred yards from the switch where this accident happened. I live with my father. I remember the circumstance of the wreck which occurred there in which Engineer McGinnis was killed. I was at home part of the time on the day before the night on which it occurred. I went to Temple that afternoon. I returned from Temple just about sundown. When I got home I unhitched my team. I was living there at my father's place. I unhitched my team and fed them and it was about dark when I got through. I remember something attracting my attention about the time I unharnessed and fed my team. It was the report of an explosion. I can't tell exactly—couldn't tell exactly from the sound whether it was a gunshot or a pistolshot. My opinion is that it was not a gun; it was not a pistol; it was too loud a report. I could not tell the exact direction from which that sound seemed to come. I was on the north side of the barn. The switch was a little bit west of me at that time. If the sound had come from the north and east, nothing would have intercepted it—nothing more than some slight timber on the creek. Coming from the direction of the switch, the barn was between me and the sound. I did not hear anything more on that order that night. The first intimation I had that there had been an accident was when I saw the wrecker coming down there the next morning at about sunrise. I afterward went down to the switch; my father and some of my brothers went with me. I made an examination of the switch stand and the track there. The switch stand itself seemed to be perfect, but the rod at the bottom that leads out seemed to be disconnected. It was just lifted off of that bar here and laying down by the side of it. There was no piece of iron there like this. There was just this one on this other side. I noticed the broken bolt or nut right here—this one (indicating). That is broken near the elbow where the pitman rod goes. It seemed to be a fresh break. I noticed some discoloration on the leg of the switchstand right under here and up on this. I noticed some dents or scars, and there was part of it ground off of the edge next to the crankshaft here. There was discoloration on the edge of one of the legs next to the crankshaft, and the edge appeared to have been ground off. I could only see that these discolorations were gray. I have seen iron that has been exposed to an explosion and the discoloration on it was somewhat similar to this. I don't know anything about nitroglycerine. I did not think at the time that this discoloration was caused by gunpowder or black powder. I don't — whether it was caused by nitroglycerine: I don't know what effect that would have or what effect it would produce. I am a farmer, and not employed by the Santa Fe at all. "I don't know anything except that I heard a report late in the afternoon before and just what I have stated here. I don't know what the report was, and I cannot testify which di-

rection it came from. I had gone home from town and was feeding my horses. I don't know whether the sun set about 6 o'clock on the 22nd of September. It is true that that is the equinox, so on the 6th of October, the sun would set a little before 6 o'clock. I presume it must have been about 7 o'clock that I heard this report. That would be a little over an hour, but I am not sure, because I don't know how long it was between sundown and dark. I don't think I had been home an hour. I would give it as my opinion that it was just before 7 o'clock. I had not heard any other report that night; nothing unusual at all. I did not hear any report about midnight indicating that anybody was interfering with the track down there or causing any explosion for any purpose.

"I was down there the next morning. I noticed a little discoloration on this arm here. I stated that I saw the discoloration on the base, and I also saw it on the arm. The discoloration was on this piece and slightly up on this arm. It was a gray color. I don't know which side the discoloration was on, but it was on the under side; it might have been clear across. I noticed an abrasion or dent along on one edge of this arm. I noticed that that morning. There is a dent right there—that corner is ground off—I am referring to this corner up here. I did not notice any dent down here. I did not notice any discoloration here on the outside. I would not be positive, but I think that switch was sitting on a tie. I did not notice whether it had been pressed upon by force being applied to it. I did not notice whether there was any injury to the tie, on which this switch was attached. I did not notice whether *there was any injury to the tie, on which this switch was attached. I did not notice whether* the switch light was burning; I do not know whether the light had been put out or not. If there had been any hole blown out in the ground, it was not sufficient to attract my attention. There were no marks of an explosion on the ground so far as I could see.

"I would not be sure, but I think Mr. E. P. Mathis went down there with me." (Record, p. 79 to p. 83, L. 4.)

E. P. MATHIS, on behalf of the defendant, testified as follows:

"My name is E. P. Mathis. My occupation is farming; I live with my father. I was at home on the evening of the night before Mr. McGinnis was killed. I live about three or four hundred yards from the place where the wreck occurred at Silenus. I was picking cotton the evening before that wreck; I quit about dark. I had to go about three hundred yards to the house. I went home immediately. On the way home there was an explosion of some kind that attracted my attention. From my knowledge of firearms, if it was a gun, it was larger than any I had ever heard. It came from the direction of the switch. There was a little bit of timber on the creek between me and the switch. There is no question in my mind as to what direction that sound came from. It was direct from the switch. I was about 500 yards away from the switch when I heard that. From my knowledge of firearms I would judge that that was the report of an explosion of some explosive. I did not hear anything more that night. At that time it was not sufficiently light for me to have

seen a man on the track from where I was. I judge I could have seen a man for some 40 or 50 yards. I was about 500 yards from the track. I was not disturbed again.

236 "My attention was attracted to the fact that there had been a wreck about daylight the next morning. The train standing there called my attention to the fact. I saw a light that I supposed to be in the baggage car. After the wrecker went down, we went down there to the wreck; that was about sunup. I did not make any examination of the switch stand until afterwards. I was close to the switch. I saw that this piece which runs out to the track was not in its usual condition. They were working on that when I was down there. This pitman rod was disconnected at the time; they had it off, working on it. I heard some one say something about powder marks on the switch stand, and I noticed them on the stand. I did not notice anything else until my attention was called to it; I did afterwards. I noticed something that looked like smoke there on the stand; I noticed some on this plate here and some up there. If that is the name of it, I noticed some marks on the plate and some on the inside of the legs of the switch—on this here, and on this, is where I noticed the stain. I noticed a bolt broken—this bolt right in here. It was a fresh break. I did not notice any piece of iron missing until I heard some of the men say there was something gone. There was no piece of iron over the pitman rod when I got down there; it was gone. I did not notice any dents or anything on the inside of the switch leg indicating that a piece of iron had struck against it. I heard some gentlemen talking about this discoloration; I don't know who they were; I did not know Mr. Ed. Miller at that time. I got acquainted with him later. I got acquainted with Mr. McKay later, too. There were a number of railroad men there. They did not call my attention to it, they were just talking about it. The place where I saw that discoloration on the base was on here and here, as well as I remember, it passed around under here. I don't know whether some of it would have been under this. If this was on it, probably that would have covered some of the territory that I saw the discoloration on. That is the line I drew there. I noticed the discoloration on the outside here. I was standing over on the side there to see that—I don't remember the position. I don't know about that over there—I wasn't noticing anywhere except where they stood." (Rec., 83 to p. 85, L. 24.)

J. D. EFFERSON, on behalf of the defendant, testified as follows:

"I live in Bell County near Temple. I live about three or four hundred yards from Silenus switch; Silenus switch is a little southeast of my house.

"I recall the occurrence of the accident there in which Mr. McGinnis lost his life. I was at home the afternoon before that happened. My business is farming. I am not connected directly or indirectly with the railway company. My land lies on both sides of the railway. I was picking cotton on the evening before that accident happened that night. I live three or four hundred yards north

from the switch. My sister, Miss Jennie Epperson, was with
237 me. I noticed a man walking along the Santa Fe track on the right of way that evening. I don't know who it was. I can't tell you exactly what time it was that I saw him, because I did not have my timepiece, but it was just about sundown. He was walking down the railway, going south. That would be in the direction of the switch. I cannot describe his height and size, but probably his dress I might describe that slightly. To the best of my knowledge, he was in his shirt-sleeves. I did not know the man. I suppose if it was one of my neighbors with whom I was well acquainted and I had thought anything about it, I could have recognized him; I was close enough to recognize him. About that time I went and weighed my cotton and went on to the house. It was then between sundown and dark; it was getting a little dusk. When I got home I fed my stock. I was just through feeding my horses, and had started to milk when I heard a noise like a gun. It was a pretty loud noise. I didn't think much about it at the time as to whether it was an explosion or a firearm, or what it was. To the best of my knowledge, it came from towards the switch. The first time I heard of the accident was the next morning when I went down to pick cotton, and then I saw the wrecker down there; then I saw the cars. I went on down where the wreck was. I only glanced at the switch-stand when I went down there; never noticed it much. I did not notice whether this rod, this pitman rod, was disconnected from the switch, until later, and lying on the ground. It was lying on the ground. I did not notice the switch close enough to tell whether there was anything gone from it. There looked to be a little discoloration on the switch-stand. I did not make a close examination. This discoloration looked a little white. Where that discoloration was it looked like a burn of some kind. I am not an expert on dynamite nor anything of that sort.

"The man I saw was going in the direction of Heidenheimer, going south. I did not see any man going north with a shoe box under his arm. It wasn't anything out of the ordinary to see a man going down that track. They do not all of them ride in automobiles; some of them walk. It was just the way he walked that attracted my attention. He was walking so very slow at that time, all the time—at that time of day. They walk faster at that time of day than any other time. I don't know why that is; I can't tell you whether it is because they are going to supper, or whether there is any other reason. All I know is that he was walking slow. He didn't have any explosive lighted at the time. I did not even think about him at the time of the explosion. I had not forgotten all about this man until the claim agent came to see me. I thought about it that night when I was down there. I worked that evening—the day they worked on the wreck; I went down there that night to see them get the passenger train past the wreck, and when I heard them talking about the burned place I thought about the slow-walking man. Of course, I had thought about it as I went to the house. I just made the remark to my sister, that he was walk-
ing slow, was a slow coach, or something like that; he was
238 not an old man; he was about twenty-five or thirty, I guess. I don't know how far he had walked. I saw only the side

of his face, but I did not recognize him. He was going on down the track as I quit the field. As I went on to the house, he walked in behind the hill, then I went and weighed my cotton. I had to go about one hundred and fifty yards from the house. This man had had time to get to the switch when I got to the house—he had more than had time. I don't know whether he had time to get down to Heidenheimer; it would depend on how fast he was walking. He just looked to me like he didn't care whether he was going anywhere or not. He did not seem to be watching me or anybody; he seemed to be looking down the track. He didn't look at me like he thought I was going to blow up the track. He didn't interfere with me or hold me up. He would not have got any money if he had. (Record, 86 to p. 89 L. 15.)

Miss JENNIE EPPERSON, on behalf of the defendant, testified as follows:

"I live out south of Temple. I live near Silenus on the Gulf, Colorado & Santa Fe Railway track—Silenus Switch. My house is three or four hundred yards from the switch. I remember the circumstances of the wreck there when Mr. McGinnis was killed. The evening before that happened, I was picking cotton in the field below the house. I was nearer the track than the switch. I was picking right down close — the track. I quit picking cotton between sundown and dark. Just at the time we was quitting, I saw a man going down the track. I would not have noticed him at all if my brother had no- called my attention to him walking so slow. I did not recognize him at all. I went to the house then, after I weighed my cotton. It was a little before dark when I got to the house. My attention was attracted to something after I got home, after I got to the house. It sounded like a gun. I don't know anything about pistols or guns; I never paid much attention to it. I thought at the time that it was a gun. It was loud; it came from the direction of the switch. I went down to the place of the wreck the next morning. I did not make any examination of the switch-stand or the track there; I never noticed it." (Record, 89 L. 16 to p. 90 L. 16.)

B. G. HAWKINS, on behalf of the defendant, testified as follows:

"My name is B. G. Hawkins. I live in Bell County. My occupation is farming. I am not connected directly or indirectly with the Gulf, Colorado & Santa Fe Railway Company. I live about a mile from Silenus in a northwest direction. I live on the west side of the track, probably three hundred feet, I reckon, from the track. Then the switch would be southeast of me.

"I recall the occurrence of the wreck there in which Mr.
239 McGinnis, the engineer, was said to have lost his life. The evening of the day before it occurred, I was at home. About dark or a little after, my attention was attracted by hearing an explosion in the direction of the switch. It was just a little before dark. I was sitting on my front gallery—my house fronts west—with my little boy and I heard a report of some kind; it was pretty

loud and my recollection is that the fact that the hunting season was not open made it attract my attention. It appeared to come from the south or from the direction of the switch. It appeared that way from what I heard. It seemed to be off at a distance—really it didn't seem very loud. I was about a mile from it. I could not form any opinion from this sound whether it was the report of a gun or a pistol or some kind of an explosion.

"My attention was next attracted to the switch during the night. I remember waking up and seeing several headlights there, but did not know that anything unusual had occurred. The next morning in crossing the track a negro told me that there was a wreck down there. That is the first I heard of it. I went down there, I think, about 9 o'clock. I got my paper about 9 o'clock; I read it in the paper and then went down there. The first thing, I went down and looked at the engine and the cars, and I saw some men standing around the switch engine, and I just walked up and looked it over. They were talking about it. I saw where there was a bolt or something gone, and a piece broken off. I don't believe I could show the jury—I didn't get down and examine it. I don't remember that I noticed whether that pitman rod was connected with the switch-stand or not. My recollection is that I could see that that bolt was freshly broken off. I did not make a critical examination to see whether there were any burns or pow-er stains on the stand, but I remember seeing, it seems to me, some little white specks. There was several men around it, but I suppose I was about this close to it. (Record, 90, L. 17 to L. 15 p. 92).

W. J. Hester, on behalf of the defendant, testified as follows:

"I live about three miles or a little better south of Temple. My occupation is farming. I am not connected directly or indirectly with the Gulf, Colorado & Santa Fe Railway Company, nor employed by it in any manner or form. I live a little better than a quarter, between a quarter and a half mile from Silenus Switch.

"I remember the occurrence of the passenger train being wrecked at Silenus in which Mr. McGinnis is said to have lost his life. I was in the field picking cotton late in the evening before that occurred at night. When I went to the house I was sitting on the east gallery; I think it was about sundown or a little before when I went on the gallery. While I was on the gallery, just about dusk, my attention was attracted by a report of some kind in the direction of the switch. If that was the report of a gun it appeared to be a mighty large one. My attention was called to the switch again that night. Some time during the night there was a fuss down that way, and I didn't know what it was. I didn't pay any attention to it, or go down that night.

240 "The first I heard of the wreck was the next morning about 9 o'clock, I reckon. I went down there as soon as I heard of it; I got down there a little after 9 o'clock. I did not make an examination of the switch-stand while I was there. I did not look at that at all. I passed along within three or four feet of it, but just went on towards the wreck. I did not take any pains to find

out whether there was anything unusual the matter with the switch-stand or not. I did not notice whether that pitman rod was connected with the switch-stand or not." (Record, 92 L. 17 to p. 93 L. 26).

J. A. HEWITT, on behalf of the defendant, testified as follows: "I am a farmer. I am not connected with the railway company in any manner whatsoever. I live about six or seven or eight hundred yards from Silenus Switch, on the G. C. & S. F. Railway. I do not know anything about this accident—did not know anything about it until after it occurred. I did not hear any explosion. I went down there, I suppose about sunup or a little before—just as early as I could get off. I made an examination of the switch-stand at the point of the wreck. I went right to the switch-stand the first place. I found that switch bar and the connection off. By "off" I mean disconnected from the switch-stand. I found it lifted off of the pivot, and that cuff there, whatever you call it, wasn't on it at all. This cuff here was not there at all. I looked for it and could not find it at all. I found a bolt broken on the base of the stand—the bolt that holds this cuff on there. That seemed to be a rather fresh break. I thought that the switch-stand showed indications of a powder stain or burn. I examined it very carefully. There was a kind of a brown looking substance there on it, on the switch-stand itself—down there on this plate, I mean—on this plate—on this cuff. I found it right down under this, on here and up on the stand. I deceded at that time that there was a dent there. It seems to me like that place is right along on there, on a sharp edge—I didn't mean a dent, I just mean a sharp edge—I don't call that a dent—it has got a sharp edge. I will take that back about the dent. When I got there it seemed to me like when that piece was blown off or knocked off that this sharp edge was shorn off. This wasn't there at that time—this cuff. I never saw that cuff. I found indications there that this cuff had been brought into contact with something else. There is a dent in there. I was not talking about the dent in this—I was talking about the rough edge of it there. There is a dent in that cuff. When I went there there was no cuff at all on this, and that pitman bar was off. I have not had any experience at all with the effect on iron of an explosion of dynamite nor of nitroglycerine. I know something of powder, but not of its effect on iron. I cannot tell you whether that appeared to be the result of an explosion or not. I don't know anything about dynamite or what sort of a color it would leave there. This was a kind of a gray or dark yellow deposit of some sort.

241 "I didn't say it was brown—I never said anything about anything brown. I- was a kind of a dark looking color, sort of gray, kind of a dark color, kind of a little gray looking color. It was right down here—right under here. I think right there is where they put it if they dynamited it at all. They told me they did not use a stick of dynamite, but a liquid of some kind. I don't know whether they could pour it down there or not—I never examined it—I ain't no dynamite fellow. I suppose that they put

it under there. I could slip my finger under there. I can put it under here—I wasn't talking about that—I didn't say the color was here—it is over here. I don't know how you are going to get it under there; you might pour it under there. I guess you could secure it in some way.

"I am not an expert in such matters.

"As to the condition that I found there, I did not mean a dent—I meant a kind of a scrape—when they prized it off it would be scraped—the edge of it. I suppose if you was to hit that with an axe and knock it up against the edge there, it would scar it up. I don't know how it could have been done." (Record, 94 to p. 97 L. 4.)

R. L. PAINTER, on behalf of the defendant, testified as follows:

"I live southeast of Temple, between a mile and a half mile from Silenus Switch. The switch is southeast from my house—mostly south. I recall the fact that there was a wreck there some time ago, and Mr. McGinnis was killed.

"On the evening before that wreck I was in the field picking cotton up from the house. When I was picking cotton I was somewhere between a quarter and a half mile from the switch; I suppose I was three or four hundred yards from the railroad track; maybe five hundred yards. I did not notice anyone going down the track in the direction of the switch. Late in the afternoon my attention was attracted by an explosion down there, but I could not tell from where I was whether it was right at the switch. There was a hollow or a grade between me and the switch. I was not in sight of the switch; I can't see the switch from the field or the house. It was between sundown and dark that I heard this sound of an explosion. I went down to the scene of the accident the next day. I noticed the switch-stand when I went down there. It was something like 9 o'clock in the morning when I got down there. I went to the gin in Temple the next morning, and I didn't know anything about it until I got to town.

"I was looking at the piece that was blown off of the stand—it was off—I don't know how came it off. I can't tell you whether this pitman rod was connected with the switch or not. I noticed that there was a bolt or a cuff that fitted on the other side that was missing. I noticed that there was a bolt that held that on that was broken, it was a fresh break. I was looking at the stand and I discovered a gray sediment, or something like that, on it. I did
242 not make a close examination of it. I don't know just exactly what part of the switch-stand that deposit was on, but somewhere near that bolt there, where it was broken. That is all the examination I made.

"If the new piece of iron was bolted down here and left in that condition, I would think it would naturally be a different color under it there where it had been covered up and not exposed to the sunlight and the rain than it would be on the outside. I would naturally think that. I would think it would be a darker color on the outside where it was exposed to the sunshine and the rust. I did not examine it closely. I just heard a report there that evening;

I don't know what it was; I just knew it was a kind of an explosion." (Record, 97 to p. 99 L. 8.)

W. L. REEVES, for the defendant, testified as follows:

"I live about a mile this side of Heidenheimer. Silenus Switch, you might say, is north from my house; it is about two miles—a mile and a half or two miles. When the wreck took place I was at Heidenheimer; I lived at Heidenheimer at that time. I went up there to look at the wreck in the evening after dinner. I heard about it before dinner, but I did not go up there until after dinner time, about dinner time. There was a good crowd of people there. I went up there and looked at the switch-stand. I discovered from my examination what looked like powder or something burned there on the switch-stand. Me and Mr. Bardon stood there and looked at it. It was there in front somewhere that I saw these stains. It looked like there had been something burned there, powder or something there—I can't tell you what it was. There had been something burned there, but I could not tell what it was; I don't know anything about dynamite or nitroglycerine or powder or the effect it would have on iron.

"There was a white spot there like something had been burned there. There is a white spot there. I don't know whether or not anything had been burned there; I would not swear to what discolored that. To the best of my recollection, it was along there somewhere; it was on that piece of iron somewhere—I saw what looked like it was white, like you might have burned powder—poured powder down there and set it on fire. I guess there are other things besides powder that make white stains; you might put some white there. Besides the color, it was smoky. It was a smoky color. If you set powder on fire on a rock and stick a match to it, it sort of resembles that. It was a color that you see to black powder burned on a rock. That is the color I mean; pour black powder on a rock and burn it, and it will make a smoky color. I never said positively that it was out here—it was on there somewheres. I don't recollect where it was. It was on that piece of iron there somewheres. I don't recollect whether it was out here or over there; it was down here—right in there somewheres. I am positive about that. It was right in there somewheres." (Record, 99 L. 9 to p. 101 L. 7.)

243 R. L. BARTON, for the defendant, testified as follows:

"In October, 1909, I lived three and one-half miles southeast of Temple, about three or four hundred yards west from the switch where the wreck occurred on the night of October 5. I recall the incident of that wreck. On the afternoon before that I was picking cotton; I was on the east side of the track not very far from the switch. There was people up and down near that switch all the afternoon; there was a fence gang. I saw a man sitting on the switch a little before sundown; I don't know who he was. He was just sitting on the switch. That is the same switch where the wreck occurred that night. I heard a report that night just right at dark. I was

going from the field to house. That was after I saw the man at the switch. It was a loud report; I think it was louder than a gunshot.

"I went down to the place of the wreck the next morning. I made an examination of the switch-stand. I found something wrong with it. That rod there was off. The bolt was broken and the lug was gone. I noticed a little blotch on the switch-stand, an unusual color. I cannot say whether it was such a stain as you might expect where there had been an explosion. I was down there when the lug was found. I was there about twenty minutes after it was found; I was there when it was fitted over this place; it would have fitted if it had not been bent some way. This lug is like the one that was found there.

"A man was sitting on the switch. I don't know whether he was an old or a young man; I was not close enough to see if he looked like he was tired. I don't know whether I saw him before he got to the switch or not. I saw several men walking on the track. One of the men I saw had something under his arm. This man might have been by himself; he was just about the switch, sitting down. I had seen people do that frequently; there was nothing unusual about that. I wasn't close enough to see how he looked. I didn't think anything about that. I noticed some kind of blotch or color on the stand. It was right under here that I saw that. It was kind of a grayish color. Right there where that lug would fit, I saw where this lug is fitting over there—this had been freshly broken off. I saw that bolt that had been recently broken; that left a new place, a brand new place—this other part here had been exposed to the weather and this had not. Nothing can get under there, not even water." (Record, 101 L. 8 to 103 L. 9.)

M. R. TARRANT, on behalf of the defendant, testified as follows:

"In October, of 1909, my occupation was that of bridge foreman on the Santa Fe; I was located at Temple at that time. I recollect the time when No. 17 was derailed at Silenus. I had occasion to go down there in the afternoon, as well as I remember, about 3 o'clock; somewhere along there about the middle of the afternoon. I made an examination of the switch-stand. I found the shield that protects the connecting rod was gone and the connecting rod was disconnected from the main stand. I examined it, smelled of it,
244 and looked at it. Had a kind of a frosty color, something like that. I got down and smelled of it; it smelled as though there had been some explosion there of some kind. I have used explosives some. I am a bridge man. This smelled like an explosive. I wasn't there when that lug was found.

"I can't tell you whether that explosion, from the way it smelled, was before 6 or after 6 o'clock, nor how loud it was, nor whether it was black or white powder, nor dynamite nor nitroglycerine. I have never handled any dynamite or nitroglycerine. It showed to be an explosive of some kind, but I could not say what it was. The dynamite and powder explosions that I have seen have a smell; I never did smell a nitroglycerine explosion. I cannot say that this was a powder explosion; I cannot say that it was dynamite. There, per-

haps, is a difference in the way powder and dynamite explosions smell. I can't tell which this was. I never noticed particularly whether there is any difference in the color that dynamite leaves and the color that powder leaves. I only noticed the color that was there. I never noticed the color that dynamite or nitroglycerine leaves on iron. It was in there—in right directly under this lug. There wasn't any of it under here, or I didn't notice particularly any of it back here. I just noticed a little around this one—kind of a light grayish color. I didn't see the lug." (Record, 103, L. 10 to p. 105 L. 5.)

MAYNARD ROBINSON, on behalf of the defendant, testified as follows:

"I am master mechanic for the Santa Fe at Temple. I have held that position nearly five years at Temple.

"I remember the occasion when train No. 17 was wrecked at Silenus. I went down there. I think it was between 3 and 4 o'clock in the morning, on the wrecker. That was a couple of hours or such a matter after the wreck. We took the doctors down there with us. When I got there, relative to the switch-stand I found the pitman rod was disconnected and the safety lug was missing. The light was burning and showed for the main line, showed a clear track. This long rod that is attached there is called the pitman rod. That was disconnected. With that disconnected, the switch would not have any control whatever over the track. With that disconnected, the light could show for the main line and the points moved any way. Handling the pitman rod with it disconnected would not affect the light on the switch-stand at all. I made two examinations of the place where that lug was, one when I arrived there in company with the superintendent, and one after daylight. I examined that lug or bolt that holds it in place. I saw the break. I am a machinist. I would say that that was an absolutely fresh break. That is a three-quarter inch rivet that holds this lug in place, to the best of my recollection. The lug that it holds in place is constructed of boiler steel, I think about one fourth of an inch thick by two and one-half inches wide, something like that. With that lug in place, it
245 is impossible to disconnect the pitman rod from the switch; it would take a great force to remove that lug. The evidence of the rivet, in my opinion, showed that force had been applied. There was not any evidence around there to cause me to form any conclusion as to what kind of force had been used until the next morning. I had heard some of the farmers talking of an explosion, and I went and made an examination of the switch-stand and found what I considered evidence of an explosion. That evidence was a discoloration on the switch-stand. That lug could have been removed by the use of dynamite or some other explosive. I did not examine the track. I was not there when that lug was found; I had taken some of the wrecked coaches back to Temple, and did not see the lug until we returned to the wreck.

"I have examined this switch-stand. There is nothing the matter with that switch-stand now, except that that lug is gone. If the lug

was replaced we could use that switch-stand now. That switch-stand is in safe condition for use with that lug put back. The only thing the matter with that switchstand is that lug is gone. I don't think that by the mere splitting of a switch by a train that that damage could have happened to that switch-stand. That switch-stand is located the length of that pitman rod from the track, and I should say another foot where it connects with the points to the bridle rod—I think that is the name of it. From what I saw there, I am not in a position to say that any part of the train struck the switch-stand. No part of the train struck that switch-stand—could have struck that switch-stand and simply have removed that lug and not done any other damage. I don't think any jarring or jolting in the track, striking or switch-points in the track by a train, could have forced off that lug and done no other damage. There is absolutely no weight or pressure resting on that lug when a train is going over the track. That lug is simply a safety device to hold the pitman rod in position—that is the same of it—safety lug. When the train goes over the track, if the switch is out of order and the rails forced in any direction, they would apply force to this pitman rod. By applying force to the switch-points, they would not apply force to the pitman rod at all. It is not connected with the pitman rod at all. I don't know what the height of one of these switch-stands is. I don't know the size or dimension of this pitman rod. I don't know the character of material that switch-stand is constructed out of. I can't state by just looking and forming an opinion.

"This lever by which the switch is operated was in proper position that night when I discovered it. When I went there it was in the socket and locked, so that the switch had not been thrown by the use of that lever. I know this is a Santa Fe standard switch by seeing them on the Santa Fe storage platform. This is the only way I know it. I don't know how long this particular switch-stand had been in use; I could not approximate it. I had nothing whatever to do with the track. Assuming that it had been in there about a year, it had not been in there long enough to make it defective and dangerous to use.

246 "This pitman rod connecting with the switch-stand here is the rod that holds the switch-points. Sometimes I can tell whether a thing is straight by looking at it. From looking at that rod I would say that it is bent now." (Record, 110 L. 4 to p. 113 L. 24.)

J. S. GRANT, for the defendant, testified as follows:

"In October, 1909, I was division lineman for the Santa Fe. I was on train No. 17 when it was wrecked at Silenus. I was riding in the smoker. The first thing I noticed that caused me to know that there was something wrong, was that I was trying to hold myself together to get hold of something to hold to keep from falling. I got out of the train; I raised a window and got out as quick as I could, before the train stopped; the train went about ten feet after I got out. I picked myself up, scrambled around there and got my tools together and looked around and saw

there was some damage done, and I thought perhaps there might have been some wires damages, so I put on my hooks and went up the pole to see whether there was any of them broken down. I found there wasn't any broken, so I went on up to the top of the pole and was looking around over the wreck. I seen two men standing over inside of the right-of-way—just inside of the field. I don't know just exactly how far the right-of-way fence is from the track—any way, the telegraph line is 42 feet from the middle of the track, and I don't know how far it is the other way to the right-of-way fence, but that was 175 or 200 feet from it, any way.

"I was in the car, in the smoker. I was working for the Santa Fe. I had my climbing apparatus with me. When this wreck occurred my climbing apparatus was in my tool bag. Indeed, I did not put them on before I went out of the car. I jumped out of the window head first. I took my climbing apparatus with me. I put them on my feet or legs—you can't put them anywhere else. I put them on after I got outside of the car. I did not see anybody when I first got out of the car. I was on the west side of the train. Then I put on my climbing apparatus and climbed the telegraph pole. I was not looking for anybody until I got up on top of the telegraph pole; I was looking for the wires. I never saw anybody on the outside until I got out of the car and climbed up the pole. I saw lots of them on the inside. I don't know who they were. I don't know whether these men got off the car before I did and ran; if they did, they was pretty quick." (Record, 119 L. 6 to p. 120 L. 25.)

Eighth Assignment of Error as a Proposition.

The Court of Civil Appeals erred in overruling and failing to sustain plaintiff in error's Eighth assignment of error in that Court, which was as follows:

247 "The court erred in failing and refusing to set aside the verdict returned herein, and in failing to give the defendant a new trial on the sixteenth ground of its amended motion therefor, which was as follows:

"'The evidence clearly indicates that the switchstand at the point in question had been tampered with during the night of the accident by some evilly disposed person, and that but for such tampering of said switch the train would not have been derailed.

"'There are no circumstances in evidence which put the defendant company upon notice that this switchstand was likely to be tampered with or that it ought to be inspected during that night. The conclusion is irresistible that the switch was in good condition prior to dark of the afternoon before, and for each and all of these reasons the verdict of the jury is against the manifest weight and great preponderance of the testimony.'"

Statement.

H. E. HOLMES, on behalf of the defendant, testified as follows:

"I am an engineer in the service of the Santa Fe. I remember

the time that Number Seventeen was wrecked at Silenus. I was just about getting up at that time. I went down there. I got there about 2 o'clock a. m. I made an inspection around there; examined the switch-stand and it was in the proper condition. It was just like it is now, showing for main line. The target and light showed a clear track. That indicated that the switches were set for the main line. There was something broken or off around that switch-stand; there was a lug gone. By a lug I mean that piece of iron over on the other side there. That lug which you hold in your hand was gone. The purpose of this lug when it is in its proper position is to hold that rod on—that pitman rod. The pitman rod was not connected with the switch when I got there. It was disconnected. Throwing the lever then, with the pitman rod disconnected, did not have any control at all over the track.

"I got down and made a careful inspection around this switch. I did not smell anything. I seen a grayish color there on the stand. I don't know whether it was powder stain or dynamite stain, but it was the color of a powder stain after it had been exploded. It was a powder color. I don't remember now how long that was after the wreck occurred at 1:40 in the morning. It was some time after when I examined it, somewheres around about daylight, I think. I noticed the grayish color on it. I was down there when that lug was found. It was found in a direction off from the switch-stand like towards that door there—in a field about two hundred and some odd feet. It was some two hundred odd feet over in a field. I fitted it back in its place myself. It fit
248 on there all right. There was a grayish color on that lug to indicate powder stains, and then there was a kind of a scar on it. From an examination of this lug, I will say that that is the same scar. I got that lug from Mr. Maxson, took it out of Mr. Maxson's hands and fitted it on there. I was there when it was found. The lug was found by a negro man. There was considerable effort made to find it before that. There was quite a crowd looking for it. I can't really say how many men, but there was a good many. I don't remember Mr. Griffin, the division engineer, at all. I examined the switch-points. I have seen those switch-points down in the yard. I think they are the same ones. I think that is the same set of switch-points down there in the yard, and that they are in the same condition that these points that were in that track on the night before the wreck—I think they are the same ones.

"These points was not hurt at all in the wreck. I never noticed any others—never paid any attention to them. I paid attention to these.

"I have been railroading about nine years with the Santa Fe. I have seen split switches before—have gone over switches in yards. I have seen wrecks before and derailed trains. I have seen them in as good condition as this. I remember noticing that now. When a train was derailed at a switch point, I remember having seen them in good condition. I don't know when that was, but it was right here on the Santa Fe—it was less than ten years ago—less than five

years ago—it was south of here on the Santa Fe. You would know as much as I do if I told you how far south.

"Those gray spots on the stand were in here. The gray spots on this side were right in there. I will say that the gray color that I saw up here, from here to here (indicating); from here to there would be about five inches; five inches of the gray space — grayish color. This lug was gray—the underside and the top side, both. It was gray on this side and this one. I don't know whether there was any gray on the base. I just saw the grayish part on the top and the bottom of this part. I did not see any gray on the bridle rod anywhere; I didn't pay any attention to it. I can't say that there was any gray on this place here. I did not notice it. I was paying attention to it. I did not see any here; I can't say that it was. This bridle rod fits back this way. This being north towards Temple, this lug was found about two hundred feet in a field at an angle towards that (indicating); it is the way you are pointing. I don't know in what direction that is, whether it is a little south by east; anyhow, it is in that direction (indicating). Here is the switch-stand and the lug was right out in the field—right out here." (Record, p. 71 L. 5 to p. 74 L. 12.)

W. L. ALEXANDER, on behalf of the defendant, testified as follows:

249 "I occupy the position with the Santa Fe of general claim agent; I occupied this position in October, 1909. I remember the occasion when No. 17 was derailed at Silenus. I went down to the wreck and got there that evening. I made an examination of the switch-stand and the bridle rod or pitman rod or connecting rod, whatever you call it, on the evening of the wreck, the evening following the wreck, between 7 and 8 o'clock, I presume. That was made by lamplight, I think, or with matches, or some other way, probably. Probably it was not so late—I don't remember that. I found evidence that looked like something had been exploded on the switch-stand—the lug was missing on the right side looking south, and the bridle rod was disconnected. I examined that nut that held the lug in place. That was broken off and appeared to be a fresh break. During the following day, this timber was sawed off—it extended through the track—it was sawed off and sent to Galveston, and was in my office up until the time of the last trial. During the time that it was in my office, that switch was not tampered with in any way. It came to court in the same condition that it was when I removed it, in exactly the same condition as when we removed it from the track at Silenus.

"I made an examination of the cross-over switch. I found that the points of the switch were intact. The points were perfect except on the left switch, that is, the left point looking south, which would have nothing to do with the main line when lined up, and it had a little sliver off of it. That would be four or five inches from the main rail when lined up for the main line. I have examined this cross-over switch down in the courtyard here; I examined it at the last term of court, but not this time. That appeared to be the

same cross-over switch that was in there; that switch was removed and taken to Temple for safe keeping and brought over here for exhibition on a flat car.

"I was there when that lug was found. It was found in a field on the left side of the track looking south about 240 some odd feet in southwesterly direction—southeasterly direction, considering that the railroad runs north and south; it was found clear off of the right-of-way. There had been considerable effort made to find that lug. Thirty-five or forty people, including myself, had been looking for it, and finally we would organize systematically and go a few feet apart and come around; we did that way, but it was found by a negro. With the lug removed, all you would have to do is to disconnect—to disconnect the switch, would be simply to lift that pitman rod off of the shoulder. After it is off of the shoulder the switch is not controlled by the switch lever. It would not have any effect; would not control the track at all. After you disconnect this pitman rod you could, by hand, move these switch-points any way you wanted to.

"It is not at all customary on the Santa Fe or any other railroad that I know anything about, to keep track walkers and inspectors of switches going out over the track at night, unless it is some-
250 thing extreme—a heavy rainfall or overflow, something to put them on notice. Aside from that, it is not customary to have men walking the track examining the track at night. No railroad in the State does it. You can't very well operate a railroad without switches. I recollect the character of country down where this switch is located; the track there is straight track; it is not in a cut; it is open country there. That switch is on a straight line of track. I suppose it is slightly down grade going south, but it is a very slight per cent. So far as the eye is concerned, there is practically no grade.

"In the construction of this switch-stand the purpose of having this heavy lever here to fit down there in this curve and this lug to fasten it in position, is to prevent anyone from handling that switch or throwing it in any way other than as authorized in the pursuance of work. It is not possible to move that switch when this lever is down and the switch is locked, except by the use of force. With that lug in position there is no weight or strain on the lug at all. It is a fact that it is not connected with any part of the switch that bears any strain. Its purpose in being there is to prevent the connecting rod from pulling off of the elbow that fits on there; it is just a safety device. I have occasion to examine safety devices a great deal. It is a part of my position to suggest means or machinery or anything that I find that will tend to make the service safer. I do it monthly or daily. This is a standard switch-stand; I do not know of a make of switch-stand that is any better adapted for the purpose it is intended than this switch.

"I have only worked for one railroad. I was never conductor for the Santa Fe, or brakeman. I have never occupied any other position than in the claims department. I think I occupy one of these working positions now.

"In Temple, within the switch limits, they do not have track walkers in the night time. We have men whose duty, in connection with other duties, it is to report on the switches and inspect them day and night. They have a night man that puts out switch lights at night. These men report the condition they find them in within switch limits; that applies to day and night time. Out of town stations between switch limits, in the day time, sometimes have a track walker or leave that to the section force. In switch limits I don't think every train crew that goes through *it* supposed to report on it and inspect it—I don't think train men are supposed to. For instance, if you got out of Heidenheimer and go through a switch, the train crew would be responsible if they should run through it—it would be their duty to spike the switch at once or put out a flag until it was spiked. Out in the country between stations and between switches they have track walkers or section men, and the section men light the lamps and report conditions if they find anything out of the usual with the switch, and repair it. It is their duty to examine it.

251 "It was between 7 and 8 o'clock—it might have been a little earlier, on the evening that it happened, that I reached Silenus; I got there that afternoon. I did not smell anything there that evening. I did not smell anything there the next morning. I looked at the switch. I saw the discoloration along on the switch-stand under there and there. I don't remember that I found any out here. There probably was. I found some right under here, I think. I don't think I found any up on top here, nor in there." (Record, 105 L. 5 to p. 110 L. 3.)

W. E. MAXSON, for the defendant, testified as follows:

"I reside in Galveston, Texas. I am general superintendent of the Gulf, Colorado & Santa Fe Railway Company. The duties of that position are to supervise the maintenance and operation of the road.

"I know where the Silenus Switch is. I know when that passing track was put in there; it was put in the latter part of 1907, probably not finished up until the early part of 1908. It was put in in that year, in the winter. That is the place where this wreck of No. 17 occurred in October, 1909. The weight of the rail in the main line along there is 85 pound steel; in the side-track or crossover, we used sixty pound steel. We use creosoted pine cross ties in the track.

"I went down to the wreck the day following the accident at the time No. 17 was derailed. At that time I made an examination or inspection of the switches and track at that place. When I got there the switch had been reconnected and was in service, but I observed the indentation on the ties where the wheels had left the rail, indicating that it had left the rail near that point, and I asked Mr. Hull, the superintendent, to place the head rod and the switch-points in the position in which they found them immediately after the accident. They did and that indicated that the points were open and allowed the wheels to drop in on the ties on the cross-over, and the engine and part of the train followed the main line rail, where it caused the engine to turn over. These switch-points were taken out of the track and taken up to Temple, and it is my understanding

that they are now at court. The condition of these switch-points when I was down there, was what we call first-class condition. One of the points, the outside or east point, which set against the rail when lined for the side-track, was slightly worn at the point, but not sufficiently to be unsafe or in any way dangerous. If the points are open, it will ditch a train, whether the points of a switch are open or not, if it is cocked, what we call cocked, or partially open, it is going to wreck a train if it runs through there without regard to the switch-points. Suppose these switch-points had been in there only two days and yet had been left open to catch the flange of a wheel in the train, the result would be the same. If the point is open enough to catch the flange of a wheel, it don't make any
252 difference whether that point is worn or new, the result is going to be the same. That track was put in there the latter part of 1907. This accident occurred in October of 1909, which was less than two years. With the character of use that that track and switch had had, it ought to have been in good condition. We keep them in good condition all the time, regardless of the service they have. This switch-stand was taken out of there and taken to Galveston, and was kept in the general claim agent's office until brought here to court. The condition of this switch-stand when I got down to the wreck was just the same as it is there, except the head block was fourteen feet long. The switch-stand had never been removed from the head block. That is where it was standing when the accident occurred. That head block is fourteen feet long and extends through under the track; it was sawed off between that and the end of the track. The inside lug was missing. Aside from the fact that that lug was put back in position, this switch stand would be in proper condition for use. It would be safe to use this switch-stand if you would re-rivet the lug back in the original position. That is the only thing that is the matter with the switch-stand. I don't think that switch-stand could have been damaged in the way it is merely by a train running through and splitting a switch. I have never seen one damaged in that way by being run through. I don't think it would be possible. I have had fifteen years' experience as a railroad man. I never did see that character of damage done to a switchstand by a train splitting a switch. There is no kind of strain or pressure on that safety lug. The safety lug is the thing that is gone. Its function is simply a shield to prevent the connecting rod from being lifted off the stand. The pressure is on the stand and in case of a pair of wheels splitting the switch, the pressure would be against the side of it, and would either break or bend the points between the base of the stand and the side, but there would not be any pressure at all on that lug unless there was something that would catch in there with the flange to pull it up. Any ordinary passenger train would not cause any pressure on the lug.

"I had no experience in the use of explosives. I have seen dynamite used, and know what the effect would be, but I have never used it personally. As I remember, the weather was clear and pleasant about the time of this wreck, warm, if anything. There were no heavy rains to my knowledge. It was not raining the day I was there after the wreck. Under normal conditions and since I

have been general superintendent of the Santa Fe, it has not been usual or customary to have track walkers go over the track at night as a regular proposition. It has not been usual or customary under normal conditions, such as existed at that time, to have the switches inspected during the night time. I do not know of any road in Texas where it is customary. I mean by that that such inspection of the track and switches as railroad companies usually and ordinarily give to these things is in the day time. Our rules require the section men to pass over the sections at least once during the working hours of the day, or to send some one. Of course, if anything is out of order or condition, they have to repair it or protect it with orders, so that the trains will be advised of its con-
253 dition. The only time we use a night force is in some emergency or in cases of heavy storms; then our section force goes out and protects these things. The only time it is usual or customary for railroads, including the Santa Fe, to have men go over the track at night, is in the cases of emergency or heavy rainfall, or some other unusual condition. We have had, right in the vicinity of Temple, a night watchman on our track for other purposes. It was when we had reason to believe that our switches or tracks were being molested by outside parties, and we took the precaution to try to protect it the best we could. Under normal conditions we do not employ men for this. If a switch on the M., K. & T. railroad in this county had been tampered with, supposed to be, and a train wrecked, under these circumstances we do have our track watched at night—we did that for a period of two or three weeks, because we had information that we felt it ought to be done.

"Prior to the date of this accident, I had received no information, nor did I know of any condition that made me feel that this particular switch was likely to be tampered with. Had I received any information that looked suspicious along that line, as general superintendent I would have requested the superintendent to have his roadmaster give special attention and protection to whatever locality or piece of track the information indicated was in jeopardy.

"I come in frequent and probably daily contact with the train operatives, the engine men, when I am on the road. I am in a position to say that engine men know that under ordinary, normal conditions, the track is not inspected in the night time. They know that. The country at Silenus is an open, rolling country; I should say. The switch is located on tangent track; I mean by that, straight track.

"As to whether it is the duty of a man in one department of the railway service to know the duties of persons in all other departments, that depends entirely on who you apply that knowledge requirement to. It would not be the duty of the section foreman to know the duties of the machinist, and vice versa. It would be the duty of an engineer to know the duties of a master mechanic or a section foreman only in so far as it applied to his road service. In so far as it pertains to his duties as an engineer on the road, it is his duty to know the duties of a section man or a superintendent or a roadmaster or a master mechanic. It certainly is the duty of an engineer to see that the track is in safe condition before he uses it. It

would not be his duty to make a trip over it and inspect it before he goes over it. It would be his duty to look down the track and see whether the switch was properly set. He would have to presume that I, as superintendent, and the section men, had done our duty in furnishing him a clear track. It is my duty as superintendent to inspect the track, road bed and switches in a general way. I can't say that I have made a personal inspection of the ground at Silenus after the switches were put in there other than to pass over
254 the road frequently. As I remember, I was over the road three or four days before this accident, and I inspected it in a general way. I passed over it on a passenger train running at the usual rate of speed, forty or fifty miles and hour. That was the only inspection I made as superintendent.

"I was down there on the night of the wreck. I did not see the switch until after it had been connected up and put in service. I could not testify on my oath as an honest man that Bill McGinnis knew the condition of that switch on that night. I don't think anybody else could. I don't remember what questions, if any, are asked an engineer on an examination for train service, pertaining to the inspection that railroad companies make with reference to section men and track walkers. I would not undertake to swear to that. I think the production of our examination blank would be the best evidence about that. I haven't got one, but I can get one. I haven't examined the records, but I think that at the time Mr. McGinnis was killed, the run from Cleburne on No. 17 was worth about $225; I think that is correct. Since then there has been an increase of wages of about 8 per cent, I think. That would make it worth about $250. a month now.

"The run would pay just what a man himself was willing to make out of it. I suppose about the maximum amount, considering that he works every day in the month, and doesn't lay off, is about $250.00. I don't mean that there is a fixed salary of $250.00 or even $300.00 a month for this run. It depends on the man and how much time he puts in.

"I recollect these photographs. They were taken at Silenus on the afternoon of October 7th when I was there, on the day following the wreck. I was there when they were taken. They represent the wreck. That appears as I saw it when the photographer took them.

"With reference to this $250.00, in a general way, engineers who work regularly on those runs make that much or more. I judge there are several of them here, and you will be able to get the exact amount. I did not check up the pay rolls. We pay overtime in addition to the amount that is made on full time. (Record, 121 to p. 128 L. 21.)

W. E. MAXSON, recalled by the defendants, testified as follows:

"I was asked by counsel awhile ago if engineers were supposed to know anything about the duties of men in other lines of the service. That is the general idea of the question I was asked. I am familiar with the book of rules of the Santa Fe. These rules prescribe something relative to the duties of an engine man. I have a copy of the book of rules here. That is the same set of rules that was in effect at

the time of this wreck. That book contains what is called, on the Santa Fe, standard rules. I was asked if, in the examination of an engineer for entering the service of the company, if I had a copy of the questions that were asked them in regard to the duties which they were supposed to perform, and what questions were asked
255 them with regard to the duties of persons in other departments in the service of the railway company, and I answered that I thought I could get a copy of the examination questions as asked in examining an engineer for service, but all the questions asked are on the rules and regulations of the operating department, and the transportation part of the examination is on these rules. They are asked questions which pertain particularly to the mechanical construction of locomotives and their duties as a machinist in that line. It is necessary for and engineer to be familiar with book of rules. If he failed to pass examination on this book of rules he would not be eligible for service.

"I would like to read a few general rules first. 'General Rules, Section A': This pertains to the rules as assigned, to the safety of passengers and employees, and to the protection of property.

"Section B. 'Employees must be conversant with and obey the rules and special instructions. If any doubt as to their meaning they must apply to the proper authority for an explanation.'

"Section C. 'Employees must pass the required examinations.'

"Section D. 'Employees in any service of the train are subject to the rules and regulations and special instructions.'

"Section E. 'Employees must render any assistance in their power in carrying out the rules and special instructions.'

In this rule, No. 451, which applies especially to enginemen, I find: "Enginemen will, in all matters relating to the mechanical department, report to and receive their instructions from the master mechanic or his proper representative, but in all matters connected with the movement of trains they will receive their instructions from the trainmaster.'

"Rule 471. 'They must know, so far as possible, that switches are right before attempting to pass or use them, and particularly acquaint themselves with the location of derail switches, and know they are right before attempting to pass them.'

"Rule 457. 'They must have in their possession a copy of the rules, time table, and a full set of signals in good order and ready for immediate use. Each engineman must be supplied with eight torpedoes, two white lights, two red lights, two red flags, four green flags, four green lights and six fuses.'

"Rule 318. 'In case of an extraordinary rainstorm, or high water, trains must be brought to a stop and a man sent out to examine bridges, culverts and other points likely to be damaged, before proceeding. Trains will make stops at all places to ascertain the extent and severity of storms, taking no risks of any danger. They will place their trains upon a siding and remain there until it is safe to proceed.'

256 "Rule 319. 'When a conductor or engineman discovers anything wrong with the tracks, bridges, tunnels or culverts

which would be likely to cause an accident to a following train, he must not rely wholly on the telegraph or telephone to notify other trains, but must leave a flagman.'

"Rule 464. 'They must notice whether watchmen and flagmen are at their posts, and report to the trainmaster any neglect of duty they may observe. They will also report the absence of lights or signals where same should be shown.'

"Rule 316. 'No officer or employee of this company is authorized to request or require any employee to use defective tracks, cars, machinery or appliances of any kind, except at the employee's own risk of injury to their property.'

"Rule 483. 'They will take into consideration that the lives of passengers and trainmen, as well as the property of the company, are entrusted to their care, and it is fully expected that they will not only attend to all signals and instructions, but that they will, on all occasions, be vigilant and active themselves, not trusting alone to rules for safety.'

"Rule 586. 'This is under the heading of Rules to Section and Bridge Foremen: 'Unless relieved therefrom, the roadmaster, section foreman, or one or more of their reliable men, must pass over their entire section every day, Sundays included, and see that the track is in safe condition. They will especially look at all culverts, cattle-guards and banks, and see and know that each is in safe condition for the movement of trains.'

"Rule 592. This is the rule relating to section men, of which engineers must be familiar in their examination: 'During heavy storms of rain or snow, section foremen will at once go over their track to ascertain if the track is safe, and points most likely to be damaged must be given attention so that they may be cleared of ice and snow.'

"This book of rules and regulations is divided into sections, first the general rules, and then the movement of train rules, which is covered by operatives, train dispatchers, agents, yardmasters, conductors, brakemen, engineers, firemen, bridge and track foremen; also signal rules regarding flag signals and their significance, interlocking plants, handling of air as applied to the movement of trains, etc. The contents of all the rules and regulations for the operation of the road by the transportation department is contained in that book, and all men in the train service, so far as it applies to their positions, are required to have the knowledge and pass a satisfactory examination upon this book of rules. I don't think every rule in this book is employed in the engineer's examination form, but such of them as applies to the operation of trains are included, and they are required to pass these examinations. I don't think these sections and rules that I have read are the only matters
257 touching the question that was asked me. I could take time to go over this book and pick them out. There are about seven hundred and eighteen rules. Those that I read have a bearing on the question and were the ones which I turned to readily. There are many others, if I had time to look for them." (Record, 149 to p. 153 L. 23.)

F. D. GRIFFIN, on behalf of the defendant, testified as follows:

"I am division engineer for the Santa Fe for the Southern division. In October, 1909, I was assistant engineer on the Southern division; that is, civil engineer. The duties of the position I held at the time of the Silenus wreck were rather varied. I make up estimates for new construction, supervise the work in a general way, see that standards are maintained—the duties are so varied that I cannot name them all. I see, in a general way, that the track is maintained in standard service, and that the equipment of the road and the road-bed are kept in our standard shape. I am supposed to know that the track is of standard construction, and that the equipment is standard track equipment. I do know that.

"I was familiar with the track at Silenus where this wreck occurred. This is the same switch that came from Silenus. I was down there on the morning of October 7, which is the day after the wreck, about 8 o'clock, I suppose. At the time I got there the pitman rod on this switch-stand was loose from the stand, and the right lug, safety lug, was missing. I made an examination of the switch-stand. I saw evidence there that force had been used to remove that lug. The lug had been wrenched off by force. The principal condition that indicated to me that force had been used to remove that lug was the bright condition of a piece of broken steel. That was this rivet here that is in this position. Its condition was bright and shining. That indicated that it had been broken recently.

"I consider that I am familiar with the use of explosives. Nitro-glycerine is a composition of glycerine saturated in nitric and sulphuric acid, and there are many kinds of dynamite, but dynamite in general is nitro-glycerine with an absorbing substance in it to remove its great danger; that is, the commercial form of dynamite consists of various percentages of pure nitro-glycerine in an absorbing substance, which can be sawdust, it can be limestone shells, or it could be anything at all that would take up the fluid nitro-glycerine. There are two dynamites in usual use. One is called 60 per cent and the other is called 40 per cent, and the 40 per cent is called average dynamite. It consists of forty percent of nitro-glycerine and about 50 percent of nitrate of soda, 11 per cent of sawdust, and possibly one per cent of carbonate of magnesia, and as you increase the amount of nitro-glycerine you decrease these fillers that go with it to a smaller percentage. The terms powder, nitro-glycerine and dynamite are to a large extent interchangeable. There is giant powder that is practically nothing but dynamite. There are the Judson powders, and there are hundreds of
258 compositions on the market that consist in their main ingredients of nitro-glycerine and a filler, which relieves the dangerous carriage effect. You cannot handle nitro-glycerine; dynamite you can handle with ease.

"From my examination of that switch-stand and the character of the damage that I saw there, it was my opinion that that could not have been inflicted by any other means than an explosive. I was a little late in getting there, but at that time there was still

stains on the iron work, which were similar to stains which could have been left by the explosion of dynamite. These were grayish white, or any similar color to that, you might say, but they had been handled so many times that you could not be sure of the original color. These stains were similar to what they would have been if an explosive had been used. If an explosive had been used in that case it should have made a loud noise. The iron would give away the sound better than wood or dirt, either. It would be as easy to place an explosive in here, that is, to hold this up, to illustrate on this one—a stick could be placed in there if it was a stick, or any other explosive could be placed in there slightly, it doesn't need to be wide, and two handfuls of dirt, possibly, would cover over here—and at the time I got there there was a considerable depression in the dirt, say the dirt line comes up along here, at this point there was a depression in the dirt of possibly three inches—that is down this way—and probably six or eight inches back—it may or may not have been caused by an explosive placed in this sheltered position there. In that case, by throwing the switch, we lose a little of the effect there because that would be a sheltered nook in which a man could pack anything in there. To explode that would depend entirely on what the explosive was. As to what it was, I can't exactly say. The action on a piece of iron would be similar on two or three different explosive substances. If it was dynamite in stick form, it would be fired with a mercury cap, and the fuse would be lighted with a match. I have never seen any nitro-glycerine exploded. It is used principally in shooting wells, I am pretty sure, and it is discharged by making a heavy discharge, which of itself puts off the nitro-glycerine. I am not familiar enough with nitro-glycerine to say how it is exploded; I never exploded any of it. I was there when this lug was found. Considering Temple in that direction and the track toward Heidenheimer going that way, it was found off in that direction (indicating). If you want the magnetic north and south, it was found to the southeast of the track. It was 241 feet from the the track, as it was measured. I examined the switch-points. There condition was good. I have examined these switch-points down in the yard. That is the same set. I am positive that the point on the right, which is, if anything, possibly more used than the left, is the same one that was in use at Silenus, and, as the other one is rigidly connected to it, I would suppose it was its twin. The one on the right would be the one that would have the most chance of causing an accident, if it was cocked to the southbound train. Aside from the fact that the lug is gone, that switch-stand is practically
259 as good as new. It is part of my duties to know that the track equipment is standard. That is a standard switch-stand, and if that lug were replaced we would probably put it back in the track after this trial is over and it would last ten or twelve years. The removal of that lug is the only damage I have noticed to that switch-stand. I can not say whether that damage to the switch-stand could have been done simply by a train splitting a switch or not. The general conditions of the track along there are just our average track. It was in safe condition to warrant the running of trains at

sixty miles an hour. We had done it at that time and have ever since that time, and I consider it perfectly safe. They even exceed that speed.

"I recognize the switch-point on the right. It is slightly more abraded on the end—slightly more worn than the one on the left. I recognize it from that standpoint, by the marks on it.

"I have been in the engineering department for nine years, and have been in charge of work in which thousands of pounds of dynamite have been used. I have seen twelve men killed by it and have been rendered unconscious by an explosion of it. Personally, I have never done any dynamiting, but I have been present and seen quarry and railroad work done. In quarry work, which is very similar to railroad work, grading, they first drill holes to the required depth—these holes can be drilled by hand, or by steam or by air—and the next proceeding is to lower into the hole a small charge to spring it, and then the hole is loaded with a combination of dynamite and black powder, a fuse is put into the cap and lighted. Dynamite comes in sticks. These sticks are as ordered, from seven-eighths of an inch in diameter to two inches, and they are from six to eight inches long; they come in para-fin paper. As to whether a stick seven-eighths in diameter and six inches long is as powerful as one two inches in diameter and eight inches long depends on the composition inside. The object of having them different sizes is on account of the drill. If the composition was the same inside, the larger one would be the more powerful. There is a difference in the case of drilling a seven-eighths-inch hole and a two-inch. The object of making a larger one is for more power. If you wanted to blow something that would require more power you would have to use what you could buy locally; possibly in Belton you could buy two brands, possibly in Killeen you could buy one, and, posssibly, further on, none. I have never had any experience with nitro-glycerine. I would hate to use that. It is very dangerous to carry with one. It is a subject of discussion whether dynamite acts in all directions or in the line of the least resistance. Sometimes they claim it acts in the line of the most resistance. That has never been settled. When you put a stick of dynamite on the ground or on a rock, and there is an explosion, it tears the rock up and the ground all around and makes a big hole. I did not see any big hole down there that day. The cross-tie was not broken in any way. Along by the tie that the switch-stand was sitting on, I don't know whether the dirt was clear up here, or where—there was no big hole out here—it was just about the same, all except right under here,—I mean under the one we are talking about—there was more of a hole there than anywhere else. That hole was three inches by about eight inches away from the wood. That didn't blow that hole, because if it was dynamite it took place on there. That was just a side issue that some of the force would tear up that cemented gravel. That space in there is about three-fourths of an inch. You cannot put a small stick of dynamite, that is, the commercial stick, in there. You can whittle one off. There would be no danger to whittle it off—it is done every day. If you whittled it off to a half-inch you could get about three inches of it under

there. I am pretty sure that I could get that in there, and that it would blow that cap off. I don't say that dynamite was used or was placed there—I said it could have been. I would not dynamite a switch. If I had been called upon to put that dynamite in there, I think possibly there would have been stains there, because I can get my finger under there. I cannot say whether you can get a stick of dynamite under there; I didn't try that. I saw this discoloration principally in here and under there. When this is pulled back here it would not cover my hand. There is plenty of room. There is the mark that I made. If you are going to put your stick of dynamite under here, this does not change it any from the way it was over here. It does not change or effect that any from there over here. Of course, there is more room here than there was in that position. Before this was done there wasn't much room—just a reasonable amount of room between the bottom of the lug that fits over the rod and this. There is just enough room to fit without binding. You can't put anything in there except a fluid." (Record, 130 to p. 137 L. 19.)

T. J. COGGAN, for the defendant testified as follows:

"In October, 1909, I held the position of special agent with the Gulf, Colorado & Santa Fe Railway Company. The duties of that position were, generally, to protect company property and look after any depredations and find out what we could about them. That included protection, so far as we can, of the track and switches and any depredations committed on them the same as any others.

"I recall the time that No. 17 was in the ditch at Silenus. I went down there on the 7th, the day after the wreck. When I got there the pitman rod was lying on the ground, disconnected from the switch, and the lug was missing, and the points of the switch seemed to be a little damaged. I saw indications that force had been used to remove that lug. I saw on the ground that there was a hole opposite where the missing lug belonged, and there was a certain amount of discoloration on the switch-stand. I saw the most of the discoloration in this curved part here. I saw some of it right on here on this head block, that is along the end of the pitman rod; right under here, and right about here was the hole in the ground. That is, right directly under the end of the pitman rod.

261 "Nitro-glycerine is dynamite with the sawdust removed, as far as I understand it. I have seen the effect of a nitro-glycerine explosion on several safes that had been blown up on our railroad. I have experience in running down safe-blowers and examining safes that had been blown. We have got one at Kountze now—the safe was blown last month. These safes are built of iron or steel, I presume. I saw that grayish white substance that I explained I saw in the curves of the stand. This is similar to what I have seen on the seven or eight safes that I have seen, the same kind of a residue. This lug could have been blown off by the use of nitro-glycerine. To judge from the effects that I have seen, nitro-glycerine is a very powerful explosive.

"I was there when that lug was found. I think they measured the distance from the switch-stand, and I believe it was 240 feet.

I was there when it was placed over to see whether or not it would fit, and whether it came from that place or not. It fitted. I suppose there will be a report from a nitro-glycerine explosion. I have never been present at an explosion. I have heard reports and known that there had been an explosion. Up in the canyon on our road I have heard these reports, and they use dynamite up there. These reports are pretty loud.

"I would not say whether nitro-glycerine and dynamite leave the same color or not. I said this was the same color I had seen from nitro-glycerine explosions, I cannot say that I have ever seen any dynamite explosions. I think this was a nitro-glycerine explosion. It could have been dynamite. I never saw the color that was left by dynamite. I don't know whether I saw the color left by black powder, except on a safe. The kind of discolorations that I saw on safes from explosives is as far as I can remember. The man that had this kind of business to do carried a small bottle. There is a cap and a fuse, and that bottle—you could have put that bottle down there anywhere; you could have put it anywhere around there. That bottle could have been put there anywhere on the stand and connected with a fuse and the fuse touched off, and the nitro-glycerine would have exploded by that concussion. If I was going to do that, I would put it as close to that lug as possible. Suppose this lug was there. I could have put that bottle—I don't know its size; they usually use a bottle about that length—probably five or six inches long. I have seen about that size bottle. About fifteen years ago we had four men operating in South Texas and these men had several bottles about the same size—something that they can conveniently carry. We have got one in jail now. He had a bottle about the same size. There was one imprisoned in Lake Charles about six months ago. This one in Kountze, we found nitro-glycerine on him. We determined that it was nitro-glycerine because it was taken out and tested. I heard a man testify on the stand that it was nitro-glycerine. That makes two instances that I know of in about twenty years' experience. They happened to both have a small bottle five or six inches long. I have never used nitro-glycerine. It is confined in the bottle itself. Just place it on the stand and touch it off with a fuse and a dynamite cap.

262 "I saw some discoloration along on the head block. That is the head block that you have your foot on. The discoloration was right on it, down along the lug on the head block. That looked to me like a burn caused that discoloration. This discoloration that I saw over here was just about the same color as I saw on the base. I saw it on the switch-stand right in here where that depression is (indicating), about half-way down on the switch-stand right under here—I suppose that would be about an inch—scattered over it, about half-way between the top of the switch-stand and the bottom of the switch-stand. That hole in the ground appeared to be three or four inches across one way and probably a couple of inches the other way, and about two and a half or three inches in length. There was that much more depression in that particular place than anywhere else around it. From my experi-

ence and knowledge of nitro-glycerine, if a bottle of nitro-glycerine were placed under here and confined in a bottle and exploded, of sufficient power to tear this off, I cannot tell you whether it would have left any more depression on the ground or about there. I don't know what it would have done to the ground. I should think the effect of dynamite and nitro-glycerine would be almost the same. I don't think any man can tell what the effect of dynamite would be; you can't tell with any degree of certainty. I can't say as to whether an explosion of that kind would have left the light burning." (Record 137 L. 20 to p. 139 L. 6.)

R. T. SMITH, for the defendant, testified as follows:

"I live in Temple. I am city engineer of the City *engineer of the City* of Temple. My occupation in 1909 was city engineer. I am a civil engineer by profession. I recall the occasion when Santa Fe train No. 17 was wrecked at Silenus. I was down there. I was there at noon, between 12 and 1 o'clock of the next day after the wreck occurred the previous night. I mean by that that if the wreck occurred in the night time I was there the following day at noon. There had been practically nothing done—very little done while I was down there—towards clearing the wreck. I made an examination of the switch-stand. I don't know the names of the parts of the switch-stand, but there was a piece of it that had been torn off that looked like it allowed the switch to be opened. I mean this place down here; that is, one of the lugs. I had never seen that before, but the piece that corresponded to this was blown off. I saw evidence there that force of some kind had been used to remove that lug. In my opinion it was some kind of an explosion. That was my judgment as a civil engineer, that some kind of explosive had been used to remove that lug. I am not connected in any way with the Santa Fe railway. I am working for the City of Temple.

"I went down there between 12 and 1 o'clock. S. N. Strange and John McKay, and, I believe, somebody else, went with me. Mr. Strange is *not* working for the Santa Fe, taking their acknowledgements and notary work. Mr. McKay was, I understand, the Santa Fe claim agent. I judged from his actions that he
263 was interested, but did not know to what extent. Understand, that I don't know that these were indications of an explosion that I saw there. Underneath this piece there was evidence that something had burned, right underneath, in here. I don't know whether it was on this side or the other side, but it was somewhere about here. I don't know how much space it covered. It was along this side of it; it was under here, considering that that was originally like this. In reference to where the switch-stand was standing then, I saw the burned place right along here. It was a space very nearly the size of the palm of your hand; it was right there. The space in there where that powder burned showed it was nearly as large as the palm of your hand. I don't know whether I could get a space in there nearly as large as the palm of my hand or not; this was placed around like that when I saw it; if I am not mistaken, that was placed with this side that way.

There is a space almost as large as the palm of my hand. I don't know whether it was supposed to be in this position when the explosion occurred. Supposing it was, I don't suppose you could get a space as big as the palm of your hand under there. It was not red; it was not white. It was partly black. I do not see any of it on here now. It was the color of a powder burn. I don't know much about colors, but I know that when powder burns it leaves a scar. I don't know whether this was powder or some other explosive. I don't know what color burned powder leaves. I saw that rod there. Standing over by this chair and looking at that rod, I would say that it is bent. I see where that rod fits right there. If you were to lift that rod off of the place where it belongs and lay it down on the ground, and the switch had been left partly propped and an engine running down here sixty miles an hour should strike it, the force coming this way would have a tendency to bend that rod. The rod is bent.

"I don't know whether that is a natural bend that was put there by the men that made it or not, nor do I know whether this sprung place that appeared in the rod was here before the wreck or not. Supposing there was force applied against this pitman rod, that would not be any strain on that lug that is not fastened to it at all." (Record, 146 to p. 149 L. 1.)

B. A. CORDELL, for the defendant, testified as follows:

"I live in Temple. I am not connected with the Santa Fe. I recall the time when the Santa Fe passenger train No. 17 was derailed here at Silenus. I went down to the scene of the wreck and I made an examination of the switch-stand. I don't know about finding any of it gone. I don't understand anything about the switches, but in the examination I found that the switch was broken and could be turned without the use of this lever—could be moved without the use of this lever, that was locked—from some piece being blown off it. The part which was blown off, the lug, had been fastened down to the switch. That was gone. From the examination that I made there, I think that force of some kind was used to remove that lug, and I thought so at the time.
264 There was quite a crowd there. I just went down there out of curiosity with my family, and I heard that the switch was broken, and went up to the switch, and, naturally, I was interested in the track; and in examining the switch I saw that it was broken, a piece broken off—there is where it had been—it came over the lever, and I found that the switch could be turned without throwing this lever. In this examination I noticed on the base of the switch that there was a burned place—looked like there had been something exploded on it, kind of a black color, grayish color about it. In examining it, I picked up particles of some kind of explosive and mashed them in my fingers. They looked like particles of burned powder or dynamite, and I showed them to parties standing by. I actually picked that up. It wasn't dirt that I had in my hand, nor cinders nor gravel, because I would mash them and it would leave the burned smoke or soot on my fingers. I examined the

rivet or bolt that held that lug in place, to see if it had been freshly broken, and it had.

"There are things that burn that don't explode. I could not feel it this way and tell that it had exploded. I said it was a burned substance that looked like it was left from an explosion. There are burned substances left from explosions. The sign of an explosion is a good deal different from the sign of a burn. I don't know exactly as I can explain that, but I can take a burned substance on that floor and take and put down some burned powder and you can tell the difference between the two. There was the effect on the metal of an explosion. I can't explain the difference—anybody can tell it, but I can't explain it so anybody else could tell it. I can't tell how loud it exploded from the way it felt; I can't tell whether it exploded in the daytime or in the night time from the way it felt, or whether it exploded about 7 o'clock in the evening. I can't tell that. I showed these particles to some of the men, and there was some argument about it, considerable argument. I was not doing much of the argument myself—most of it. I picked it up and showed it just out of curiosity. There was a discoloration from this arm all in here and on the sides of the switch. I picked up the powder down here, some of that right at the side of the tie, and some along the edge of the tie down on the ground. I didn't notice any hole there that was blown out in the ground. I don't know whether there was any there. There wasn't any evidence of anything being blown away, except the lug; there wasn't anything else injured about the switch-stand that I know of. I didn't notice whether the light was burning or not. I could not tell whether it was dynamite or nitro-glycerine or white or black powder. The color I saw was a grayish white, like any explosive. I saw some Beaumont oil down below there about a hundred yards. I didn't see any around here. I didn't see the switch discolored anywhere except around this part, and especially right under here. The discoloration was on this piece here, all over this piece here. I don't say that it was everywhere else except under this; I didn't say it was on that part there. I saw this that day. I will just explain that this piece went over here, and there was a nut broken that would permit this piece to be lifted and the switch turned without throwing this lever here, and the lever locked." (Record, 155 L. 6 to p. 158 L. 11.)

265 FRANK HUGHES, for the defendant, testified as follows:

"My home is in Missouri, but I am stopping at the present time in Temple. I am working for W. C. Redeker. That is railroad contracting work, concrete work, work of that description, foundation work.

"I recall the occasion when Santa Fe train No. 17 was derailed at Silenus switch. At that time I was working out here on the river, working for Mr. Redeker, putting in that tunnel for the city; I was working at night. I have had some experience with the use of explosives—not a great deal. I have done that character of work for the construction company for a number of years. I used

dynamite principally. I visited the scene of this wreck; I was called upon to go down and look at it. I examined that switch-stand; I looked it over. I was there, I presume, between 10 and 11 o'clock the morning following the wreck—some time in the forenoon—I don't recollect exactly the hour. I made an examination of the switch-stand; my attention was called to it. My experience with explosives against iron is limited. I never had any experience in that line. My work has always been against rocks; I can't express exactly how it appeared, except as to color. There was not a natural color to the bottom of the stand when I saw it. It appeared to me that there had been some kind of an explosion to cause that clip to be blown off; that was my judgment. My opinion was that that could have been blown off by the use of dynamite or some other explosive. I afterwards made a test to see the effect on iron. I had never had any experience of the kind, and, not being familiar with the use of explosives on iron, I went afterwards to the quarry out close to Belton and placed a bar of iron up near the switch-stand which happened to be near there—it was a bar of inch and a quarter iron, I presume, and I placed a small quantity of dynamite, probably one-third of a stick of one-fourth of a stick, against it. I can't say that it sprung the bar at all, but it gave the same color that this switch-stand had when I saw it at Silenus. This is about the extent of my experiment. I can say fully, from my experiment, that that confirmed me in my suspicion that an explosive had been used on the switch-stand. In my judgment, as far as I could go in my own belief, that discoloration was the result of an explosion. I am not an expert, and something of that kind, like going —blowing up that switch is beyond my power. If I was going to do that, I would take my dynamite and open up a stick and get a pail of water and let it soak in the water, and then skim off the liquid from the top and take a piece of paper wrapped up in the manner of a funnel and pour against the bar. I could not use a stick of dynamite in the small space showed me there. I would take a funnel and pour it in there. It would only take a few drops to do a piece of work like that, that is, reduced in the form of nitroglycerine. It does not take much nitro to clip off a little bur like that. I am no professional yegg myself, nor a safe-blower. I haven't been accused of it yet.

266 "No one furnished me the switch-stand to experiment with. They have switch-stands out at the quarry, and that happened to be the nearest one to the powder house. I put the dynamite that I used out there up against the bar. I didn't put it up here to get that result. I told them if they would furnish me a switch-stand I would make a test. I told them I was going to make a test for my own experience, but if they wanted me to I would do it right, just like it was done down there. They did not furnish it to me. If I had been going to do this, I believe I would have recognized the fact that I couldn't take a stick of dynamite, with this small space, and accomplish it, so I would have taken a stick of dynamite and reduced it to a liquid in a pail of water, and skimmed it off. I think that is the only way to accomplish this. I don't think that dynamite or black powder would do it. If I

had been going to do this, in order to accomplish that result, the way I would have started would have been to take a knife blade and clean this all off underneath, then get a little clay or sticky mud and put it all around there—a small space is all it needs—then I would take a little paper funnel and pour it down in that little curve, confine it in as small a body as I could, then I would have gotten a fuse and set it off. That would have been in here, and would have broken that rivet off, that is the purpose. I can't answer the question as to whether that explosion would have blown this lug out in this direction; I can't say. The pressure would have been down. I don't know what it would have done to that lug. What little I have done with explosives, I always get away to a safe distance. I said I would place dirt or mud, or something, around there. I found this discoloration right along there. I could not find it on the bottom. It was some place on the side of the bar; to the best of my recollection, it was under there. As well as I can recollect it, that is the plainest point that I could see it. I don't know whether I could have confined the explosive anywhere around there and left the discoloration at the place I saw it and not at other points. I don't know about that; I have seen some peculiar things with dynamite. My opinion is that it should have shown plainly on this part here. My opinion is that it should have shown plainer on that than elsewhere. If the testimony shows that this part was discolored and the balance was not, then I don't believe the explosive could have been confined any place to have made the discoloration show here and not there." (Record, 160 L. 7 to p. 164 L. 12.)

J. H. TALLEY testified as follows:

"My name is J. H. Talley; I live in Temple, Texas. I have lived in Bell County about thirty-nine years, all my life. I was born in the county. I was raised three miles south of Temple. My father's name is John Talley.

"I know where Silenus is. The Santa Fe Railroad has at Silenus two main line switches—they have six switches there. They
267 might have a double cut-off there—I don't remember about that—if they only have one cut-off, it is six switches. From the first switch to the last one at Silenus it is something like a thousand yards—something like that—I am not sure about that—from the road that leads up to my father's house to the big road down on the other side. There are switch tracks at that place and six switches.

"On the 6th day of October, 1909, I held the official position of constable in Bell County, in Precinct No. 5, which includes Temple, in this county. I heard of the wreck and Mr. McGinnis' death. It was early in the morning when I heard of it. I went down to Silenus. The first switch is about 150 yards from my father's residence, where I was—the north switch—from our old home there.

"They have had a station there called Silenus only about eighteen months or two years, something like that. It has been built lately, possibly just in the last year or two—in recent months that this

station has been put there, since I have lived there. It was before noon the next morning when I went down there, about 11 o'clock, something like that. I went down there twice during the day, once with Mr. McKay, and once I went on horseback. That was John G. McKay, the State Purchasing Agent; at that time he was Claim Agent for the Railway Company. When I got down there, I don't know whether the whole train was derailed or not, but there was some cars derailed, off of the track, and the engine was turned head towards Temple, and the tender, I think, was on the left side going south. The engine was on the right side going south, and the tender was on the left side going south. I did not notice the engine as to whether or not it had been reversed. The engine had been torn loose from the train, and that would naturally apply the air. To break the hose or anything like that would apply the air on the train, and it had been so long that the air would have leaked out. However, I can't tell whether it had been applied or not.

"I do not know how fast the train was going. The train was something like three or four rail-lengths from the open switch after it struck—you can't tell just exactly how far that engine had been—it was turned back and the tender had gone down the track, too. The best I recollect, I believe that a car was standing just about over that switch. There was some cars standing right there. I noticed the condition of the switch. The switch point at the time that I was there, the morning after the wreck, about 11 o'clock, of the next day, the switch point on the left-hand side was a little bit open. I am speaking of the left-hand side of the right rail going south—I mean on the right-hand side going south, and the point I could almost run my little finger between the point of the switch at that time and the main line rail. The cars were still standing there.

268 There was three or four cars standing, the others kind of leant on the side of the track like. The switch was open to the extent of about the width of my little finger, something like that—perhaps not so much, but some little gap in there. The condition of the switch-point that fitted up against the rail at that time was that it was a little worn and crumpled, that is, the point was worn off and crumbled. The condition of that point could have made it a defective switch—anything of that sort would make it so an engine would be quicker to take hold of it, of a bad point, than it would a good one that was perfect. This switch-point fitting up on the main line rail fits up on the inside of the main line rail, so that if it is a sharp point fitting up close to the rail, the wheel will go onto the main line. It looked like a split switch to me. I could not tell whether this particular train had gone between the point and the rail. I saw where it left the track. That would indicate that that engine went through the switch. I saw that that switch at that time looked to me like a split switch. By a split switch I mean this, that a train going through a switch without it being thrown is a split switch—you can back through it or head through it, coming from the side track to the main line. The effect that would have would be to take this bridle rod or bend that, or do something like that. It is going to force its way through there. It looked just like

a train had been through it. I have been in the railway service and am familiar with railway service in the transportation department. I worked in the capacity of brakeman. I stated that this looked to me like a split switch, and I then explained how a split switch was made. I explained the switch-points with reference to whether or not it was crumbled or worn off. It was worn some and crumbled a little bit. That was not a perfect point. It was not at the time I seen it. I would say that a train was more likely to split a defective point that where you have a perfect point. If the switch is perfect, a train has no right to split it. There is more danger in passing over switches than other parts of the track on account of the dangers incident to defective points and being more easily interfered with—if the switch is in bad repair, it is more dangerous than other portions of the track—there is an element of risk and danger in passing over switches that does not exist on the main line on account of the switches being left open or in bad condition. If it is split that is dangerous. There are more dangers in trains derailing at switches than at other points. A switch is a break in the track. I could not tell from my observation, as a railroad man, what caused the derailment there. It looked to me like the engine split the switch. If the switch had not been partly open, or if the switch had not been defective, the switch-point, I would not think it would have been any more apt to do it than any other place. It can, of course, leave the track at any place, but it should not if the track is in good repair. A train could not split a switch unless it was partly open or defective. It would be impossible.

"I visited the place of this wreck about 11 o'clock on the day that it happened. I was there in the forenoon about 11 o'clock, assuming that it happened during the night. I don't think there
269 was a car on the track at the time I was there. The whole crew there was working to get them back. I don't know how many cars left the track at the time of the wreck. I don't know whether they picked any up before I got there or not. The rear end of the train was about the end of this switch, about even with it. There had been a great many people down there; there was several there when I got there.

"I made an examination of the switch-stand. I do not know whether the switch-stand was in the same condition when I got there that it was at the time of the wreck. I believe the bridle rod was disconnected from the switch-stand when I was there. It was either on or off. We took it off and put it back while I was there. I can't tell you whether it was on or off but it was taken off while I was there.

"I have been a railroad man, a brakeman. Railroad switches are absolutely necessary to the running of trains, in other words, you can't run a railroad and get trains over the track without having switches. All railroad men, I would say, know that. They ought to. I knew Mr. McGinnis. He was working for the company when I went to work for them. Mr. McGinnis had been over this track several times that I know of. Mr. McGinnis knew where Silenus switch was. When I got there the switch was partly open at the

point. It was something like—I don't know whether it was as wide as my finger or what. Perhaps it was one-half, maybe three-eighths, or perhaps, it was half an inch. I would say then that the switch was open as much as three-eighths or one-half an inch, something like that. There was an opening there. I don't know, of course, what the condition of the switch was at the time of the wreck, whether it was open or closed. I really don't know what wrecked that train. I simply know that when I got down there that train, No. 17, was wrecked, was standing there, and that the point of the switch, north switch at Silenus, was open as much as three-eighths or half an inch, something like that. The point of the switch was battered. It was crumbled a little, or *work* about three or four inches back from the point.

"I recognize the surroundings shown in picture No. 3 shown to me. That looks like the north switch at Silenus. I see on that the switch-point. I can't tell you whether that looks like the switch-point that I saw on the morning after the wreck. This switch down here was open just a little bit right along there, under here; assuming that this is at Silenus, that represents the left-hand rail going south, and that represents the switch connecting with the left-hand rail, the north switch at Silenus on the left-hand rail, the switch-point. That is the point that was next to the switch-stand. That is the point I saw battered—that is the switch where it happened here, right here. Assuming that that picture was taken on the 7th day of October, which is the day after the wreck, as to whether that gives the correct representation of both of the switch-points, I will say that I can't see the point on this switch here. You haven't got that plain. Cannot see where the point begins. This point here was worn there and wasn't as high as this rail. I think that does represent Silenus north switch. If it is not plain there it is a misfortune of the picture, but I don't see anything around there that would make a man know. I don't see anything there that would really make a man know it was Silenus. I see the sign there; *there* have got such a sign as that at Silenus. They have got a field off there on the left-hand side; there is a creek and there is Mr. Huey's house there. There is a fence there that looks like the place."

(The defendant then offered the picture No. 1 in evidence, showing the switch in question.)

"From an examination of picture No. 4, to see if it looks like Silenus, will say it looks like the same thing, the way the switch is lined up. That represents the north switch at Silenus. The switch in that picture is lined for the main line. The point that was bent and worn is the right-hand point going south in that picture. That is the point that fits up against the right-hand rail going south. That is the one that I saw that was bent from three-eight-s to a half inch, something like that. I don't know when nor how the point of that switch was crumbled. I have seen these big twelve-hundred-class engines that the Santa Fe uses on these night trains; I think they use the twelve-hundred-class, anyhow, they are big engines. I did not notice what class engine it was that was on that

train that night. I don't believe that I noticed the number of that engine—I am not sure about that. If some wheel of that engine of that train had struck the switch-point, it would have crumbled it as badly as what I saw. I can't say that the fact that the switch-point the next morning showed to have been battered and crumbled indicated that it was that way before this train passed over the track, because this very engine could have battered that switch-point, and if that switch-point had been open just enough to catch the flange of some wheel, then that engine striking that point would batter it as badly as what I saw there—I suppose so. As to how long it had been in that condition, will say that the first part of the switch-point that fit against the rail was old, but back further on it looked new. These switch-points that I speak of go down to a pretty sharp point so that they can fit up against the rail. That is a very sharp point. In pictures No. 2 and 3, this is the bridle rod here (indicating). That is the rod that connects the track with the switch-stand. The condition of that switch-stand at the place where the bridle rod ought to connect with the switch was that this lug that fits over the stand there was gone. The lug that fits over the top of the bolt or rivet that holds the bridle rod, or connects it, rather, to the switch-stand was gone. You could take that bridle rod off and leave it off—I am sure that we played with it there that day, back and forth. If that bridle rod was disconnected from the switch-stand, then the switch-stand did not control the movement of the rails out there. It was off like that picture shows. You could take it off when I was there; there was nothing to hold it in place."

The defendant offered in evidence picture No. 3.

"The long rod running to the side of this tie on which
271 the switch-stand sits, is called the bridle rod. That connects with this switch-point and runs underneath the main rail there and fastens on here and also on the one on the opposite rail. There is a lever at the switch-stand that you throw or turn, and that little lug that protects the bo't, and that works the switch-points, either opens or closes them, if you desire. Now, the lug that holds this bridle rod at the switch-stand and connects it with the switch-stand was gone, so that you could just take this bridle rod off of the switch entirely, and when it was in that condition, of course, it did not have any control at all over the rail."

The defendant thereupon offered in evidence the four pictures, Nos. 1, 2, 3 and 4.

"This one shows the switch in proper condition and the track up properly for the main line. That is correct. There is a little spring, or something like that, that works in this guard rail here. If you were to disconnect the bridle rod I can't tell you whether that would cock the switch—the natural spring of the steel. Perhaps the natural tightness of the switch would, it is owing to how plumb the switch was. The tendency of the switch would be to open a little, if there was no bridle rod there. I saw the switch-stand the next day, and from that, assuming, for a moment, that the switch was

in the same condition the night before when this train went through it, the bridle rod was disconnected from the switch-stand, and that, as a consequence, the switch was cocked or partly open, would have derailed the train.

"I think that section men work only about ten hours a day, start in the early forenoon and quit in the afternoon. They begin work something like 7 o'clock in the morning, and I think they quit at six in the evening. These are the only regular hours for the regular section men to work. Early in October at 6 o'clock it was something near sundown—I don't know just how long until sundown. It was not dusk at six o'clock. I had been a peace officer for some time before that around here. This was in my precinct—this switch. I was always looking out for violations of the law, trying to enforce the laws, and trying to protect property. That was part of the duties of my office. Prior to the fifth of October, I did not know of any fact or circumstance that would lead me to believe, as an officer, that anyone would try to tamper with that switch. That would have been a violation of the law and I would have so regarded it and would have looked after it, if I had known it. I was on rather intimate terms with the special officer of the Santa Fe, Mr. Miller, and the chances are that if they had known of any fact or circumstance of the kind, they would likely have told me. I was associated with them very frequently, with Mr. Ed. Miller, and Mr. McKay, also. I did not have any fact or circumstance or anything of that kind that made me suspicious that anyone was likely to tamper with that switch prior to the 5th of October, 1909. The weather at that time was good. It had not been wet weather. As an experienced railroad man I did not see anything in the
272 condition of the weather or any suspicious circumstance that I knew of that made it prudent that the railroad company should have kept that switch watched at night. I have heard of railroads keeping inspectors on the track and switches at night when the weather is good. It was not customary with the Santa Fe. It was not customary with the M. K. & T. The M. K. & T. and the Santa Fe are the only railroads I ever worked for. It was not customary on either of them.

"In looking at that picture a while ago, I stated that the defective point was on the right-hand side going south. That defective condition in that point seemed to be old on the first part of the point. Mr. Culwell asked me a while ago if I knew of any fact that would put me on notice that anybody was likely to tamper with that switch. Afterwards I saw this lug, that they call it, that holds this rod, was gone, and I couldn't see whether it had been tampered with or whether someone had broken that off or what. The switch looked split to me. On this switch that was split, if the bridle rod had been disconnected there would have been nothing to prevent that from moving back and forth towards the switch. If that bridle rod had been disconnected before this engine struck it, it looks reasonable to say that the flange of the wheel would have pushed that over and not bent it at all. There would have been the wheel of the other side of the engine to have prevented it from pushing it over. When

the bridle rod is taken off of the switch-stand, that leaves it loose and it has to be in a cramped position before you can bend this point, and there is nothing to keep it from going over towards the other rail if the bridle rod is disconnected. I did not say that it was customary with some of the roads that I knew of to inspect at night. I have heard of them. He asked if I had heard of it. I have heard of track walkers at night, but I never saw them. I have heard of them having track walkers at night to inspect their switches, but I have never seen one of them.

"Temple was only about three miles from Silenus, and is a town of some eleven or twelve thousand people. There is a Santa Fe division point there. From that point the trains go on to the west, to Angelo, and north to Cleburne, and south to Galveston. The Santa Fe hospital is there, and division points leading in each direction from Temple. The M. K. & T. Railroad also runs through Temple, going north and south.

"There is some little law breaking in Temple; I don't suppose there is any more than there is anywhere else for the same amount of people. While I was an officer over there we came nearer looking for a crook in Temple than in Heidenheimer or Rogers. I can't say that there was any more reason why there should be train wreckers loafing around Temple any more than any other important railroad center in Texas. It is my contention that there is more lawlessness in Temple than in Heidenheimer, population considered. That is true everywhere." (Record, 8 L. 8 to p. 21 L. 13.)

W. N. THURMAN, for the plaintiff, testified as follows:

273 "I live southeast of Temple and my initials are W. N.—W. N. Thurman. I am in the farming business. I remember the time when Mr. McGinnis was killed at Silenus. I went down to the scene of the wreck the next morning. I saw the condition of the switch point on the right hand side as you go south. It was open—seemed to be open and gapped up—I mean slugs out of it. That was at the point where the engine derailed. The point tapers off at the end. When I got down there, there was several people standing around—quite a crowd—I don't know how many—talking, and then, down there about fifty or a hundred yards, where the train was all tangled up—the cars—and the switch was all gapped up. It didn't look like it was fresh—it wasn't recently done. It was just gapped up. I didn't see any fresh signs. I could not tell from looking at it, how long it had been wearing or crumbling off.

"I don't know what caused it to gap or crumble off. There was just gaps there. (Record, 33 L. 10 to p. 34 L. 11.)

E. H. HARRIS testified as follows:

"I live in Galveston. I am a passenger conductor in the service of the Santa Fe. I have been in that service as passenger conductor something over two years—that is, regularly. I have been handling passenger trains in extra service for the past ten years. I have been in the service of the Santa Fe since February 10, 1893,

in the capacity of brakeman, passenger conductor and freight conductor.

"I recall the circumstances of the wreck of the passenger train at Silenus on October 5, 1909: I was the conductor in charge of that train; I had taken charge of the train at Cleburne, Texas. The train that I took there was just the train that had originated at other places, and that was just the starting point of my run. I will refer to my record to see how many cars we had. We had ten cars. We were a little bit late leaving Temple that night. If I remember correctly, our time to leave there at that time was 1:15 However, I am not positive—there might have been a slight change in the schedule, but we left there at 1:35—that would be twenty minutes late. It is about three miles from Temple down there to the north switch at Silenus. The character of the track there was very good—first class track. I had engine No. 1296 that night. I am familiar with the track and all these stations along there at Silenus. That is a straight track there—it is in the prairie, in the open prairie country. The lay of the land right at Silenus is level. There is no cut or fill along at this switch. There is a slight fall there—just enough to raise the track above the surrounding country.

"I don't know exactly how fast the schedule of No. Seventeen was to run at that time, but I think it is between twenty-eight and thirty miles an hour—that is the schedule. That includes
274 stops. It actually runs about sixty miles an hour between stations. When I first discovered that something was wrong, I was in the first coach, which is the second car from the engine, the mail and baggage car being one car ahead, and the smoker followed that, and I was in about the center of what we call the negro compartment. The first thing that attracted my attention was the motion and the starting and jerking and the escape of the steam. I was standing up at the time, and just as soon as my attention was attracted that there was something wrong, I turned around and faced the forward end of the car and called out to the passengers to brace themselves. I did not want anybody to get up and did not want them to be in position where they would likely be thrown. I think there was six of the cars that were derailed that night—the first six cars. Now, I want to correct a statement that I made a while ago—we had ten cars out of Cleburne, but we only had nine at the time of the accident, because we left one at Temple. We left the San Angelo sleeper there, so out of Temple we only had nine. When I say there was six cars derailed, I mean that they were off of the rails. They were not turned over, just off of the track. The three rear cars remained on the track and on good railing. I went back to the rear end of the train. The rear end of the train was three car lengths, as near as I can remember now, from that switch-stand. My recollection is that the switch was just at the forward end of the third car from the rear of the train. That is as near as I can recollect it now. I made an examination of the track or switch that night, within a few minutes after the accident.

"That is the switch-stand there. I have seen that switch-stand before. I recognize this switch-stand as being the one at the point of the wreck to the extent that the lug is gone. Of course, they are all alike. This switch-stand now is in the same condition that the switch-stand I examined at the point of the wreck was immediately after the wreck. This rod that is connected at the base of the switch-stand is generally known as the pitman bar or bridle rod or throw rod. They use various terms. This pitman rod was not connected at the stand at the time I examined it. When I examined it after the wreck the rod was lying alongside of the track. At this point here (indicating) this bridle rod is connected with the connections that hold the two switch-points together. It operates the switch in only one position here. When you want to throw the switch you raise the lever. The switch now would be set for the side-track. The lights up here show red with the switch thrown for the side-track. That is a danger signal.' The track is lined up for the side-track. After throwing it, it ought to have been in that shape that night, showing the green light there. With this switch lined up for the main line, the right rail, that is the right-hand switch-point, would be up against the main rail, the left-hand point would be about five inches away from it.

"This one that is lined this way shows the track lined as it ought to be. It shows the switch on the right-hand rail going
275 south close up to the main line rail. The switch-point on the left-hand side is open about five inches. I have no impression of the lights that night immediately after the wreck. When I looked at the switch-stand that night, the track, I remember very distinctly, was as it is now—set for the main line, but as to whether the light was burning bright or dim, or at all, I don't remember. It would not be possible for the lights to show a clear track and the switch now show the same signal unless the light had been tampered with. If it was in the proper condition, it could not show anything else. You can't put that light on wrong. It is so fixed that you are bound to put it on there right. I would call that the end of the switch-stand—I don't know exactly what the proper term is. That is so constructed that there are two long spikes together and two short spikes together, so that either way you put that on there, it will show a green light when the switch is set for the main line; in other words, you put it on there that way, and this will show a green light, and the only way to show a red light is to throw the switch or set the lamp on one prong there. It would not be secure there.

"When I got down to this switch-stand that night, this bridle rod or pitman rod lay in this position (indicating) and that rod, in that shape, with the nut gone, would not have anything to do with the track. You can throw this thing all day long and it would not affect the track any way. These lugs there held this pitman rod in position on the swit*h*e-stand—there are two lugs—one here and the other one here. This one was gone. It is gone now. This break here on the bolt was new. I call this a lug. There should be another lug on the other side of this switch rod,

just like this is here now. That lug is fastened with a bolt that goes down through the bottom of the switch-stand into the tie. That lug ought to be fastened on there with a bolt and the end of the nut run out practically over the end of the bridle rod like this one does. This one was gone. The switch-stand also showed that it had been sheared that something had come up there with considerable force. That was all new. This lug was gone and there was a sheared place there. I do not know where the lug was afterwards found. I don't know that it was over three or four or five minutes after the train came to a stop until I got back to this switch and discovered the condition of it. As soon as the train stopped I got out onto the ground and walked towards the head end. I did that for the purpose of seeing what was the matter and to try to see if I could locate the engine men, the engineer and fireman, but the engine was so enveloped in steam and I started back and met my flagman and explained to him the conditions as best I could, and told him to get back to Temple as soon as he could

"This large piece of wood on which this switch-stand rests was just an extension of one of the ties under the track. It has been sawed off to bring into the courthouse. That is the longest cross-tie that we use. It is what is known as the head block.

276 This switch-stand is set the length of this pitman rod outside of the left-hand main rail, going south.

"I examine- the switch-points and cross-over track. The switch-points were all right and the connection, as far as I could find from an examination that I made, the switch-points on the right side showed that something had scraped along there, probably a rod, or something like that. The switch itself was partially thrown at the time I saw it. The right-hand switch-point, as near as I can judge, was probably one-half an inch or so from the main line rail. It wasn't up close against the rail.

"This switch-point right here on this picture, the one on the right-hand side, was thrown about half an inch. With that thrown, it could derail a train. The one that ought to have been closed was pulled out so that the engine, instead of going down the track, would split the switch. If this pitman rod had been connected with the switch-stand and the switch showing for the main line, that switch-point would not have been in the shape it is now, but would have been closed like this (indicating).

"I stated that I was the conductor on the train on which Mr. McGinnis was in charge as engineer the night he was killed. I judge that we were running about sixty miles an hour when we reached Silenus switch; I judge that from the way we were running along and the way we usually ran. We were going along just as we usually did. That was not an excessive rate of speed. It was the usual and customary speed at which we ran. I had just started taking up the tickets after leaving Temple a few minutes before the wreck occurred. That is my first duty, unless something interferes, to go through the train and take up tickets. We left Temple at 1:25 and the wreck occurred about 1:40. It is about three or three and a half miles from Temple to Silenus. My at-

tention was not attracted nor was there any occasion for me to notice the condition of the switch light at Silenus as I approached it. I had no warning or indication of danger until after the wreck, until after the accident occurred. The train stopped very suddenly. Three of the coaches had not passed over the switch. I could tell the switch the train had split or gone into. That was the switch at which this stand was located. That is not the north switch at Silenus—that is what we call the north middle switch. There is another switch at the extreme north end. We had already passed over one switch. This was the cross-over switch. I could see where the switch was open and the train had gone into it. As to it being the duty of the engineer or conductor to inspect switches, that is a matter that is governed entirely by the position of the switch, track, etc. The conductor is kept back in the train and he is not in a position to observe these things as he approaches, unless something would call his attention to it. It is not a part of his duties to inspect the tracks or switches other than as it appears to him as he is passing over the track unless he has reason to believe there is something wrong with it. At this switch the pitman rod was off at that point there, disconnected right there, and this lug was gone and the switch was open for about an inch, something like that. It was open sufficiently—it didn't
277 have to be closed for the flange to go over it. If the wheel hugged the rail close it probably would split the switch. The fact that the train was derailed indicated that it had split the switch—that the switch was open. This pitman rod is attached to an- connected with the switch-points. When the switch is set for the main line track, the switch-stand being on the left-hand side going south, the pitman rod would be extended furtherest towards the south—that is, it would be moving furtherest to this point, in setting it for the main line. That would depend a great deal on the position of the switch-stand—the way it was set, of course. Taking into consideration the manner in which this switch was set, the pitman rod would extend further that way from the switch-stand in setting it for the main line, at that particular switch, because it had to bring the right-hand rail, the furtherest from the switch-stand, up against the main rail, so if it was set for the main line and the lever was worked so as to set it for the switch, the pitman rod would be drawn back towards the stand, under the second lug furtherest from the stand. In adjusting that switch-stand and in placing it there, it was supposed to be adjusted so that when the points were set for the main line, that the switch point would have to be close to the right rail, so that the switch-point, fitting up there sharp against the right-hand rail, about the same width and size as if it were one solid rail. The switch-points would taper it off to such an extent that there is not any point there to offer any obstruction or but very little difference in the rail at that point and any other point on the line. The flange of the wheels of the train and the engine fits on the inside of the rail. The flange on the right wheels fits on the inside of the right-hand rail and the flange of the left wheels fits on the

inside of the left-hand rail to hold it on the track. If the flange of a wheel were to strike the defective point, and that point were crumbled and worn away, forming a shoulder for the flange to extend up on, there would be no danger of splitting the switch. It might mount the rail, but it would not split it. It might ride upon it. If it was to ride upon it, it might derail it. This is the reason and the necessity for proper switch-points—to reduce the risk and danger. If the switch-point did not fit up against the rail, it might possibly cause the wheels or a flange to split it. That particular flange or any flange in that train should be hugging the rail. If the switch-point was worn away so it did not fit up closely to the main line rail and the flange would go into that, it might possibly cause some risk and danger of a derailment—if it was worn away and did not fit up close to the rail. I have seen split switches. Moving a car through a switch that is set against you causes split switches. It is called running through a switch. That is what is generally called, in railroad language, "Splitting a switch". Running through a switch is going through it when it is set against you. Running through a switch might leave it open and then another train going in the opposite direction, might split it. If a switch-point is perfect, with no defect, and fits up closely to the rail, there is absolutely no danger of a train splitting it. It is considered solid rail.

278 "I did not see anything of the lug around there. I looked for it in the immediate vicinity of the switch-stand, but I never could locate it. This was the morning of the 6th. I left Cleburne on the night of the 5th, that put me by Temple on the morning of the 6th. Mr. Greer was the fireman on that train. I did not see him immediately after the train stopped; it was some time afterwards, probably fifteen or twenty minutes. I couldn't find him when I looked for him, but I afterwards did find him in the car. I don't know whether he was on the engine when it turned over. That is where he belonged. I presume he was. He was there when we left Temple. I don't know whether he jumped or not. None of the passengers were seriously injured." (Record, 41 L. 16 to p. 52 L. 1.)

E. F. GRESHAM, testified as follows:

"My name is E. F. Gresham. I live in Fort Worth, and am a railway mail clerk. I was engaged in that same business in October, 1909. I was not in charge of the United States mail car on the train on the night of October 6th, when Mr. McGinnis was killed—I was on the car with another fellow. I was in the mail car in the service of the government. I first got on that train at Forth Worth. Mr. McGinnis took charge of that engine at Cleburne. I rather think Mr. McGinnis lived at Temple at that time. I am not sure, but I remember seeing his folks meet him at Temple at times. His run was supposed to end at Cleburne, as I understand. The train that he took charge of at Cleburne was Santa Fe No. 17. That is the fast passenger train. I can't say whether that is one of the best runs on the road or not. That is a good run, supposed to be. I came

through Temple that night. I do not know whether we were on time or not. We left Temple a little late, it was between 15 and 25 minutes late, I am not sure just exactly. The usual and customary rate of speed in making the regular time of that train from Temple going towards Heidenheimer is, I suppose, about fifty or sixty miles an hour. I know where Silenus Switch is from Temple. It is about three miles from Temple. I suppose we were running about sixty miles an hour that night when we got to Silenus. That is pretty fast speed for a passenger train. It is not more than that train runs a great deal of the time. It is a very fast train. As we approached Silenus, looking down the track, I did not notice any warning or signal of any danger; I saw the light—a green light. The green light was burning. That indicates that the track is clear, go ahead. The red light would be burning to indicate danger, or that the switch was turned, but the green light was burning. Going along at sixty miles an hour, the first indication I felt that there was anything wrong was the sudden stoppage of the train. It seemed—I don't know for sure whether the engineer reversed the engine or applied the brakes, but in either case the train began stopping at a—it just began to slow down very rapidly. It was a very sudden stop. Mr. Greer was on the engine that night with Mr. McGinnis, I think. I think he is here. The first thing I noticed was the sudden stopping of the train. I grabbed the rods in the
279 car—there is a rod runs through one end of the car, and I cried to the other fellow that was with me—without reference to what I said, I could not tell about how far the train ran until it stopped, not until afterwards. None of the coaches turned over. We are due out of Temple at 1:10, I think it is, and it was about 1:40, between 1:30 and 1:40—possibly 2 o'clock at night. I got off of the train after it stopped. The engine was on the right-hand side where the mail car stopped, nearly even with it; the tender was on the left-hand side a little further up. I saw Mr. McGinnis there. I examined the switch. It was crumbled some, and it looked to me like there was part of it gone, that is, the switch-point. That was on the right-hand side, going south. That switch was open some, I can't say just how much, but it was, I remember, open some. That train was standing there with part of a coach over the switch point, so that the entire train had not passed over the switch where the derailment occurred. I did not see the switch until about daylight the next morning, about sunup, I suppose. I had been there all the time. That was as quick as I could get relief. I was with the mail at the time.

"I am a railway postal clerk. The duties of that position are handling mail, distributing letters and sending them to different places, letters and papers. My regular run, as I remember it, at that time was on trains Nos. 17 and 18 of the Santa Fe, between Fort Worth and Galveston. I did not have a thing to do with the running of the train. It was not part of my duties to examine the track, and it was none of my concern about the condition of the switches. I was representing Uncle Sam. The only thing, I was

injured some in the wreck myself, and, of course I wanted to see the probable cause of it. That is no more than any other passenger would want to know, that the track was all right, but it was certainly not part of my duties on the job I hold to examine the track. I was kept busy part of the time on the job I had, until I was relieved. By "relieved" I mean when the company sent a man to take charge of the mail I was relieved from further duty. That car on that night picked up some mail at Temple. I was supposed to work that mail. I mean by that if we had a piece of mail going to Rogers, we are supposed to get it out, if we have a piece for Galveston, it would go in the Galveston sack. I had worked the principal part of that mail when I left Temple. Another duty I have is looking out for side stations; we take on mail at all these stations, even though we don't stop; we have a crane there that we hang up, and it is my duty to look for these. If I carry by a pouch or fail to get one, it is charged against my record. I had got mail at Temple. The car that I work in is 30 feet, with paper tables and paper sacks along in the car and pigeon holes for the letters. That is the inside of the car. That car has doors on either side. That is not the only way we can see; we have windows all along the car; windows all along the rear end of the car, the rear end of our part of the car, I mean, along the sides at the rear of the car on each side of the car. At the front end or in front of the door
280 there is no windows, but back of the door there are windows strung along there every few feet. These windows are up some distance from the floor. A person can see out of them, though. You can't very well see out of them and see a switch-stand; I did not see any switch-stand through a window. I got mail at Temple destined for various stations in South Texas. I hardly think I might have had foreign mail on there, too. I might have had Mexican mail on there, some Mexican mail. It was my duty to see that all mail was segregated and was put off at the right station, and that mail going on other railroads was properly transferred; that is part of my duties. I also pick up these pouches where the train did not stop, and that mail had to be distributed. Temple is a pretty good sized town. We handle a great deal of mail out of there, but there is a great deal of it worked out and fixed up. For that train to run from Temple to Silenus, about three miles, going, say, sixty miles an hour that night, I don't know how long it would take, getting in and out and the block; sometimes it takes longer than other times. It ought not to take five minutes, but sometimes they have to wait for the blocking and other things. I don't know that they were not making any sixty miles an hour that night if they had to wait for the block; they can pick up speed pretty fast. It is a part of my duties to look out for Silenus Switch, because of the fact if I wasn't there I couldn't tell if that was Silenus or Heidenheimer from the fact that I might have been busy or something else. It is a custom that I never fail to do. If it had been Heidenheimer, I would not necessarily have looked out the door on the other side. I sometimes go to one door and sometimes the other. I am usually pretty familiar with the country, and I look just to

locate myself. We don't get mail on No. 17 at Heidenheimer; we put mail off there. We would not have to take mail on there. I did not know that I was not at Heidenheimer. As I stated a while ago, I wasn't real busy that night. The station house to the town of Heidenheimer was on the other side of the track from the door I went to. I had the right to go to both doors if I wanted to. I think I could tell by going to that door whether it was Heidenheimer or not. I have been over the road so that I think I could tell from the houses and things around there. I think I could. There was nothing that attracted my attention to the switch lights more than I always look at switch lights when I go to the door. I don't know how many switches there are between Fort Worth and Galveston. I remember seeing another switch light up here that was red. I don't know that the reason it impressed itself on my mind was because it was a red light, and *the* meant danger, but I just noticed it. I don't know what there was about this switch light that made me want to notice it that night; just curiosity; I don't know. I don't know whether I looked at the switch lights at Pendleton that night. It has been a year and a half ago, and I don't know. I don't know whether I looked at the switch lights at McGregor, but if something had impressed itself on my mind, I would have known. That is not an afterthought; something that occurred to me after the wreck. There was no reason why I should
281 go to the door especially to look at the switch light at Silenus, but I went to the door and looked out, and I recalled after the wreck that the light was clear. It was still clear after the wreck, showed a clear track, and the bridle rod that connected the switch was disconnected, so that when it was disconnected that bridle rod did not have anything to do with that switch-stand. When I went there the switch light was showing a clear track, but the bridle rod that connected that with the track was disconnected. That was disconnected there and the lights showed a clear track. The bridle rod was disconnected at the foot of the switch-stand. That rendered the switch absolutely powerless so far as the track is concerned—it looks to me like it would be. I don't remember noticing that the nut that held this bridle rod onto that pivot was off and gone. I know that the bridle rod is held in place there so that it can't be moved without great force. I saw that night that the bridle rod was disconnected, and yet the light showed a clear track. I also noticed on the night of the wreck that the cross-over switch was partly open, partly thrown. It looked like the point of the switch was gone. I don't know how long it had been gone. I don't know what caused it to go. I don't know but what some train or the front wheel of the engine had struck that switch-point and broken it off—I don't know anything about that. I said the bridle rod was disconnected when I got there. I didn't see it until about daylight the next morning. As that nut was gone and the rod disconnected, and as the switch was partially thrown or cocked, it could have been struck by one of the wheels of that train—it is possible. I never had any experience along that line. Judging from other times when I had timed the train, I thought it was going at the rate of sixty miles

an hour that night. I did not time it that night, I suppose, simply because I did not want to. I might have had something to do up to that time, so far as the government was concerned, but not at that particular time. Our mail is made up in one and two, and Heidenheimer and Rogers are holdouts. From what I remember, that engine was about five cars or six cars from the switch-stand, I don't remember how many cars we had in the train. I don't know how far the rear end of the train was from the switch-stand—how far this switch-stand was from the rear end of the train when it stopped—I did not pay any attention to it. I was back there, but probably I did not notice it at all. I think one car was standing on this switch. I don't think it was the last car in the train. I did not testify on the last trial of this case that the last car in the train was standing about ten feet from the switch-stand; I deny that. I examined the switch-points by looking down under the car. The car was up some distance—probably I stooped over there—I don't know just what position I got in. I didn't crawl under there. I didn't testify on the former trial that I did crawl under there. I deny that. I was asked that question, and I said I did not. I was asked this question on the former trial: 'You went down there the next morning?' I answered that question: 'Yes, we had to go to Temple.' 'And I crawled under and looked under the cars to see the condition of the switch.' I was asked that question. My answer to that question was that I did not crawl under it. I
282 said I looked under the car. To the best of my recollection I said it was not necessary for me to crawl under the car.

"I am still working for the government. I am not unfriendly to the Santa Fe. I haven't got a thing in the world against the Santa Fe. They treated me just as nicely as can be. I always say a good word for them when I can. I can prove that in Fort Worth from people who travel. I don't remember any correspondence that the Santa Fe has ever had with me only in regard to the settlement of my claim, a personal matter." (Record, 21 L. 13 to p. 30 L. 2.)

K. S. HULL testified as follows:

"I am Division Superintendent of the Santa Fe at Temple. My district is from Bellville Yards to Cleburne and Temple to San Angelo; Silenus is in my district. I was Division Superintendent at the time of the wreck of train No. 17 at Silenus in October, 1909. I went down to the wreck. I got there some time between 2 and 3 o'clock a. m. I don't know just the exact time, the same night of the wreck. I was there about an hour after the wreck. I made an examination of the switch-stand. That is the switch-stand here; it was removed from this track, assuming that the wreck occurred early in the morning of October 6th, on the second day, on the 7th—the accident happened on the night of the 5th, and the switch was removed the morning of the 8th. We didn't get the track cleared until the afternoon of the following day, and the passing track was used for handling trains. The next day that switch was taken out, which would be the 8th. I examined the switch that night. It was in the same condition that it was when I examined,

except that it is not connected with the switch-points. So far as the switch is concerned, it is in the same condition. From my inspection of it that night, I found that one of the lugs was missing, and the pitman rod was disconnected from the switch-stand. The lights were burning, and showed a green light, lined up for the main line. With this pitman rod disconnected from the switch-stand, the cross-over switch could be moved at will be itself, but you could not operate the track at all by this lever of the switch-stand; it was disconnected. I examined the switch itself and the cross-over track. I have seen this track downstairs. It is the same one, or an exact duplicate of that switch. In my judgment, it is the same switch. That switch down there was taken up, taken to Temple, and brought from Temple over here to court. That switch downstairs is in identically the same condition that the switch was in that I examined at Silenus immediately after the wreck. I am sure of that because there are some marks on one point that are still on this point. The switch-points that I examined that night at the place of the wreck were in first-class condition. There was not anything defective about these switch-points that would be likely to wreck a train. That train left the track at that point on account of the rod being disconnected from the switch-stand, which allowed the points to come over, and caused the engine to take the cross-over and run into the side-track. The switch-points didn't have a thing in the world to do with that; they were open about an inch and a half. That was sufficient to wreck a train. If that switch had been opened that much during the day time
283 when other trains were going in the same direction, it would undoubtedly have wrecked them; if it was in that condition when a hand car went in the same direction, it would have thrown it from the track. I was there when these photographs were taken. In picture No. 4, the track was lined up for the main line at the time this picture was taken. I lined the switch myself. That shows the switch-point that was partially open at the time of the wreck when I first got there. That was this point here (indicating), this rod here was disconnected from the switch-stand and allowed these points to open, and this one here was standing about an inch and a half from the rail, which caused the engine to go down over the cross-over. That photograph correctly described the condition of that switch-point that fits up against the main rail at the time that photograph was taken. There has been no change whatever made in that switch-point from the time I first went to the wreck up to the time that picture was taken. That picture shows that switch-point to fit as close to the rail as it could be made to fit. With that switch-point in the position that it appears in that picture, trains could pass safely over that track. This picture was taken the next day after the wreck.

"I saw evidence around that switch that night indicating that force had been used to get that lug off. There was on the base of the switch-stand a coloring that was effected from an explosion of dynamite or powder, a gray color. I have had experience in the use of explosives. I have been in nearly all departments of rail-

road service; have been in the bridge and building department, have built bridges, done track work and excavating; I have used explosives; used dynamite. That lug could have been removed by the use of dynamite. There was coloring there—I can't say whether it was dynamite or nitro-glycerine—the coloring is about the same, and so is powder, but as a general thing the coloring from black powder is a little darker. An explosion by the use of dynamite makes a loud report. It depends on how you use it—how much you use and where you use it. The only thing that is the matter with that switch is that this lug is off. Suppose that lug was placed back in its proper position, the switch would be the same as a new switch-stand—it would be safe to use. As an experienced railroad man, if some machinist was to replace that lug and the company was to tender that switch-stand to me, as Division Superintendent, and tell me to use it on my division, I would not hesitate to do so. That damage that I spoke of could not have been done simply by a train splitting a switch.

"It is not usual or customary on the Santa Fe railroad, under normal conditions, to have out track walkers at night, or to have men out at night to inspect the switches; it has never been customary on that road since my connection with it. I do not know of any railroad in Texas where this is done. I have worked for another road than the Santa Fe—worked for the Fort Worth and Denver on construction several years ago. They didn't have any switches when I was working there—we were building the road.

"I think there are five or six blind sidings between Cle-
284 burne and Temple. A blind siding is a side-track located between stations to be used for the passing of trains generally. We have some blind sidings that was flag stations where we deliver and receive passengers. They have the same switch-stand as at other places. That is what I would call the Santa Fe standard switch-stand; there was no difference in this switch-stand at the cross-over at Silenus and what we have anywhere else. Station agents are not supposed, as part of their duties, to inspect switches in the night time. Prior to the time of this accident, I was not advised of any fact or circumstance that caused me to even suspicion that this switch might be tampered with.

285 "It is the duty of a station agent if he discovers anything wrong about the track or switches, to report it. There are only about four or five places like Silenus between Temple and Cleburne, except where they take on passengers. We would not take on passengers at Silenus; it is not a flag stop for passengers. We do not take on passengers when the train stops there. Railroad men who run from Cleburne and say there are more are mistaken. I can name them. Felton is the first stop out of Temple. There are two switches to the main line and two on the siding. Baggett is between Moody and McGregor, about three or four miles from Moody. There are two switches there. Pendell and Bosque—I believe Pendell is a flag stop; Bosque is not a stop; it is just like Silenus, for the meeting of trains. We don't take on passengers there. We have three switches there off of the main line. I did

not say I was an experienced man with dynamite; I said I had a good deal of experience; I know how to use it without danger to myself. This switch-stand costs about fifteen or seventeen dollars. I could take that switch-stand and light a dynamite stick and set it off. I don't know whether dynamite was used or not; it might have been nitro-glycerine." (Record, 166 L. 17 to p. 172 L. 14.)

We likewise refer to the testimony of the witnesses which is set out under the Seventh assignment.

Ninth Assignment of Error as a Proposition.

The Court of Civil Appeals erred in overruling and failing to sustain plaintiff in error's Seventh assignment of error in that Court, which was as follows:

"The court erred in failing and refusing to set aside the verdict returned herein, and in failing to give the defendant a new trial on the fourteenth ground of its amended motion therefor, which was as follows:

" 'The verdict of the jury is contrary to the law, and not supported by the evidence herein, for this, that the evidence shows that regular inspections of the switches and tracks were made by the defendant, that trains going in the same direction as the one which was derailed passed safely over this track after 5 p. m. of October 6th, 1909, that the track, switches and switch-stand was in good condition and proper for use for the passage of trains at the time the last train going south passed over the same, that during the night time on the night of which the accident occurred, the lug which prevented the pitman rod from being removed and disconnected from the switch-stand, was by a great force torn off and the pitman rod disconnected, that this was unknown to the defendant and that it was not in possession of any information which made it necessary to a reasonably prudent person that the switch-stand should have been inspected just prior to the passage of passenger train No. 17 over the same; that the switch had been tampered with by some evilly disposed person in the night time, and for each and all of these reasons the verdict of the jury is against the manifest weight and great preponderance of the testimony.' "

286 Statement.

J. S. SNYDER testified as follows:

"I live in Fort Worth. My occupation in October, 1909, was working for the Santa Fe on the fence gang. I had occasion to go over the track on the afternoon of October 5th, 1909, going south out of Temple. I went on a hand car. I passed over the switches at Silenus and they were all right to keep a hand car from jumping off. I don't know the condition of the switches. I know where that switch was located where the train went into the ditch that night. I went over that switch in the afternoon on a hand car. I could go over it all right. If that switch had been cocked enough to have derailed a train, it would have derailed my hand car. That was about 4:30 or 5 o'clock in the afternoon. I was going to Heidenheimer. I met somebody on the way. I don't know who it was; they were

strangers to me. They were two men. I met them something like half way between this switch and the station of Heidenheimer. They were afoot and were going north towards Temple. One of them was dressed in a spotted suit of overalls. I didn't pay any particular attention. We was going about four miles an hour, and I just glanced at the first man, at the man on the right-hand side as we passed him—I just looked him in the face, as we passed him, and the other fellow was a short fellow—I didn't pay any attention to him. One of them was carrying something that looked like a shoe box.

"I was going from Temple to Heidenheimer. It was something like 4 or 5 o'clock. My foreman was with me; his name is J. L. Evans. The other men were J. B. McKenzie, and the last I heard of him he was out close to Brady; M. F. Shumate who is in Fort Worth now; B. J. Wall, who is in Fort Worth, and a fellow named R. C. Pringman. The last I heard of him he was at a little station this side of Cleburne. That is six all told, I believe. We were going from Temple to Heidenheimer about 4 or 5 o'clock in the afternoon. I don't think we met anybody between Temple and Silenus; I don't remember. I remember meeting these other two men, but I don't remember meeting anybody else, unless it was a track walker. I don't know whether we met anybody after we passed these other two going to Heidenheimer. I did not say anything to these men. I did not stop; they did not stop. There was nothing unusual in it for me to see a man walking up the railroad track. It was not unusual to see a man with a shoe box in his hand.

"I first made a statement about this at Bolivar Point, after we got to Galveston. I don't know how long that was after this accident; I don't know whether it was a month or two weeks or six weeks, but I don't think it was over two weeks, but I don't remember. I haven't any idea at all about the length of time it was. I don't know as you would call it a statement—I talked about it at Bolivar Point some time after this accident. I talked about it to
287 Mr. Ed. Miller. He asked if we met anybody, and then asked who we met. He did not ask me if they had a shoe box; he didn't tell me that. As to whether I testified at the last trial that Mr. Miller was the first man that reminded me that this man had a bundle under his arm, Mr. Curtis asked me that question, and would not let me answer. As to whether the stenographer made a mistake in the question: "He is the first man that reminded you that he had a bundle under his arm?" I will say that I answered "Yes" according to that question. How did he know that he had a bundle under his arm? It had been two weeks after I passed this switch. I told Mr. Miller that I remembered these two men without anything particularly about them to cause me to remember them, except on account of the way the foreman of the gang spoke to one of the men. He says: "Hello, J. L." That is what made me remember it. I did not testify that before. I don't remember that I testified before that there was nothing to call my special attention to it or make me remember it. J. L. was J. L. Evans. I didn't testify to that before. I don't think I was called on to state whether I remembered anything unusual. There was nothing unusual that had

happened—it wasn't unusual for Mr. Evans to be spoken to. We went to Galveston the next day. That afternoon we went to Heidenheimer and loaded our tools and got ready for this extra; we got out on an extra; I reckon it was an extra. When we went over this track at Silenus, we didn't stop. We were going at a pretty good gait. I did not see anybody around there. If there had been anybody around there I suppose I would have noticed it. I did not examine the switch track or the switch-points. The light was not burning, nor at that time." Record p. 60 L. 10 to p. 63 L. 22.)

We likewise present under this assignment the testimony of each of the witnesses as same appears under the Seventh and Eighth assignments.

Tenth Assignment of Error as a Proposition.

The Court of Civil Appeals erred in overruling and failing to sustain plaintiff in error's Eleventh assignment of error in that Court, which was as follows:

"The court erred in failing and refusing to set aside the verdict returned herein, and in failing to give the defendant a new trial on the tenth ground of its amended motion therefor, which was as follows:

" 'The verdict of the jury is contrary to the law, and not supported by the evidence herein, for this, that there is an entire failure in the evidence to show any such negligence on the part of the defendant as would warrant recovery herein. There is no evidence to indicate that the defendant had failed to discharge any duty
288 that it owed to the deceased, or that the accident was the result of any negligence chargeable to the defendant, and for these reasons the verdict of the jury is against the manifest weight and great preponderance of the evidence.' "

Statement.

We have set out, under the Seventh and Eighth assignments, the testimony of the witnesses, which we think will support this assignment, and ask permission to have same considered here without the necessity of repetition.

Eleventh Assignment of Error as a Proposition.

The Court of Civil Appeals erred in overruling and failing to sustain plaintiff in error's Fifteenth assignment of error in that Court, which was as follows:

"The Court erred in failing and refusing to set aside the verdict returned herein, and in failing to give the defendant a new trial on the twelfth ground of its amended motion therefor, which was as follows:

" 'The verdict of the jury is contrary to the law and not supported by the evidence herein, for this, that while the plaintiff charged that the track at point of accident was out of repair, and that the switch-points at the place where the train left the track were defective, and that by reason of such defective switch-points the de-

railment occurred, yet there is a total failure in the evidence to show such defective condition of the switch-points as could have caused the accident. The evidence wholly fails to show that the condition of the switch-points had anything whatever to do with the derailment of the train. The evidence shows, without controversy, that if the switch was cocked or partly open, that the train would have been derailed without regard to the condition of the switch-points. In other words, there is no evidence which even remotely shows that the condition of the switch-points was the proximate cause of the accident, or that same even contributed to the accident, and in all of these respects the verdict of the jury is against the manifest weight and great preponderance of the evidence.' "

Statement.

We respectfully refer to the testimony of each of the Witnesses as same is set out under the Eighth assignment, and particularly to the testimony of W. E. Maxson, K. S. Hull and E. H. Harris.

289 Authorities.

Lumber Company vs. Denham, 85 Texas, 56;
Railway Company vs. Crowder, 62 Texas, 502;
Railway Company vs. Kizziah, 86 Texas, 82;
T. & P. Coal Co. vs. Kowsikowsiki, 2nd Texas Supreme — Annotated, 169.

Twelfth Assignment of Error.

The Court of Civil Appeals erred in overruling and failing to sustain plaintiff in error's Sixteenth assignment of error in that Court, which was as follows:

"The court erred in giving the ninth paragraph of its charge to the jury, which was as follows:

"If you believe from the evidence that the switch at Silenus was *displayed* or injured in any manner by explosion or otherwise by some person intent upon mischief, and that the same caused the accident that resulted in the death of W. T. McGinnis, and that defendant was not negligent in failing to discover the same, then you will find for the defendant."

First Proposition under Twelfth Assignment.

This charge was erroneous and on the weight of the evidence and had no evidence to sustain it, for this, that there was no evidence which indicated that this switch should have been inspected in the night time, and under the evidence an inspection prior to 6 o'clock in the evening before the accident would not have discovered the condition of the switch, as it was in good order at that time.

Second Proposition under Twelfth Assignment.

This charge was erroneous, in that negligence consists in the failure to do things in the way they are ordinarily done, and under the evidence in this case, it was not usual and customary to inspect

switches in the night time under normal conditions. The conditions existing at the time and just prior to this wreck were normal, and this charge placed a greater burden upon the defendant than authorized by law.

290 Third Proposition under Twelfth Assignment.

This charge was erroneous and on the weight of the evidence, in that it submitted as doubtful whether or not the misplacing of the switch caused the accident and resulting death of McGinnis. The jury was authorized thereunder to conclude that it was a question of fact as to whether or not the death of McGinnis could have been caused by the misplacing of the switch by explosion or otherwise, whereas in truth, if the switch was blown up, as contended for by the defendant, that was undoubtedly the cause of the derailment.

Fourth Proposition under Twelfth Assignment.

This charge was in conflict with the law as announced by the court in the fourth and fifth special charges, which were given, and because of this conflict the jury did know whether the railway company would be liable for its failure to inspect the switch in the night time or not, as the court in one place had told the jury that it would not be so responsible, and in another that negligence might be based on its failure to so inspect.

Statement.

The Ninth paragraph of the court's charge is correctly set out in this assignment. (Tr. 20, l. 1 to l. 6.)

We respectfully refer to the testimony of the witness set out under the First, Second and Third assignments, and likewise to the statement appearing under the Fourth assignment.

Thirteenth Assignment of Error.

The Court of Civil Appeals erred in overruling and failing to sustain plaintiff in error's Seventeenth assignment of error in that court, which was as follows:

"The court erred in giving the eleventh paragraph of its charge to the jury, which was as follows:

291 "If you find for the plaintiff the form of your verdict will be, 'We, the jury, find for Mrs. Mary J. McGinnis, Administratrix, the sum of — Dollars as damages, and we apportion the same as follows.' You will then in your verdict apportion such amount between any or all of the persons for whose benefit this suit has been brought, stating in your verdict how much, if anything, you find for each of said persons."

First Proposition under Thirteenth Assignment.

Both the deceased and the defendant were engaged in interstate commerce at the time of the accident in question, and the rights of the parties herein will be ruled, therefore, by the Federal Employers'

Liability Act, and not by the Texas statutes, and under the Federal Employers' Liability Act, it was not only necessary for this suit to be maintained by the personal representative of the deceased, but the recovery must be in behalf of such personal representative, and the court was not warranted in charging the jury, nor the jury in finding any apportionment between the personal representative and other persons.

Second Proposition under Thirteenth Assignment.

Where the evidence shows, as it did in this case, that the deceased met his death while employed by a common carrier while engaging in commerce between the States, the right of action therefor is in his personal representative for the benefit of those entitled to recover; their right of action is exclusive, and those for whose benefit the action may be maintained are not entitled themselves to maintain the suit, and in this case the widow in her own name and as next friend for the minor children could not maintain the action as was attempted.

Third Proposition under Thirteenth Assignment.

The Congress of the United States having prescribed by law a right of action for injuries resulting in death, the right and the remedy so provided is exclusive and supersedes any and all
292 State laws on the same subject, and in this case the Congress had provided by law the right and the remedy which should have been applied under the facts of this case, and when so applied it superseded the laws of the State of Texas on the same subject, and the defendant was entitled to have the action maintained, tried and concluded under the terms of the act of Congress irrespective of any State law on the same subject.

Fourth Proposition under Thirteenth Assignment.

It was the duty of the trial court to hear and determine this case under the terms and provisions of the act of Congress approved April 22, 1908, and its failure to do so was a denial to the defendant of a right guaranteed under the laws and Constitution of the United States, and same deprived the defendant of its property without process of law.

Fifth Proposition under Thirteenth Assignment.

The defendant railway company was engaging in commerce between the State of Oklahoma and the State of Texas at the time of the accident in question, and the deceased met his death while employed by the defendant, a common carrier, in such commerce. Under these facts the defendant was entitled to have this case determined as provided in the act of Congress relating to liability of common carriers by railroads to their employés, approved April 22, 1908.

Sixth Proposition under Thirteenth Assignment.

The Act of the Texas Legislature, same being Chapter 10, first called session Thirty-first Legislature, is void and not enforceable under the facts of this case, because same is in conflict with the Act of Congress approved April 22, 1908, on the same subject, said act being exclusive under the facts of this case.

293

Statement.

The Eleventh paragraph of the court's Charge is correctly set out in this assignment. (Tr. 20.)

It seems to be conceded that the deceased was an employee, engaged in handling interstate commerce at the time of his death.

Fourteenth Assignment of Error as a Proposition.

The Court of Civil Appeals erred in overruling and failing to sustain plaintiff in error's Ninth assignment of error in that Court, which was as follows:

"The Court erred in failing and refusing to set aside the verdict returned herein, and in failing to give defendant a new trial on the seventeenth ground of its amended motion therefor, which is as follows:

" 'The evidence shows that the switch-stand in question was a standard switch-stand; that there was none better known to practical railroad men; that the track at that point was laid with 85-pound steel, the roadbed was ballasted and that all parts of the track, switches and switch-stand were perfectly safe for the passage of trains and of this train; that the sole cause of derailment was the fact that the switch was partly open and that it could not have been open without either throwing the switch-lever or forcibly removing the pitman rod from its connection with the switch-stand. The evidence shows that the lever was in proper condition and the switch locked, but that the lug had been by force removed, which permitted someone to disconnect the pitman rod from the switch-stand, and that when it was disconnected the switch-points were opened sufficiently to derail the train; that this occurred in the night time by an evilly disposed person and under circumstances that could not have been anticipated by the defendant railway company, and for all of these reasons the verdict of the jury is against the manifest weight and great preponderance of the testimony.' "

Statement.

We respectfully refer to the testimony of K. S. Hull and E. H. Harris, as same appears under the Eighth assignment.

Fifteenth Assignment of Error.

The Court of Civil Appeals erred in overruling and failing to sustain plaintiff in error's Tenth assignment of error in that Court, which was as follows:

294 "The court erred in giving the sixth paragraph of its charge to the jury, which was as follows:

" 'Now, if you believe from the evidence that the plaintiff, Mrs. Mary J. McGinnis, is the duly qualified administratrix of the estate of W. T. McGinnis, deceased, and was the wife of W. T. McGinnis at the date of his death, and that Lyle McGinnis, Laland McGinnis and Lamar McGinnis were their minor children, and that Nelta Saunders was their married daughter, and if you further believe from the evidence that on or about the 6th day of October, 1909, in Bell county, Texas, the said W. T. McGinnis was in the employment of the defendant as a railway engineer, and as such was engaged in running one of the defendant's locomotives in the operation of one of defendant's passenger trains, and that while so employed in running said passenger train over its line of railway he ran his engine and train into a defective switch at Silenus, thereby causing the accident in question, and which resulted in the death of W. T. McGinnis; and, if you further believe from the evidence that the switch-point at said place had worn away, broken off and become defective; or, if you find from the evidence that said switch had become loose or open; and, if you further find from the evidence that the defendant had failed to inspect its said switch and roadbed and had failed to warn W. T. McGinnis of the dangerous condition thereof (if it was dangerous and defective at the place in question at the time above specified); and, if you further find that the defendant was negligent in permitting its switch to be and remain in such defective condition (if you find it was in a defective condition); and, if you further find that it failed to exercise ordinary care to inspect said switch and track, and if you find that such failure, if any, was negligence as that term has been heretofore defined, and if you further find that such negligence, if any, was the direct and proximate cause of the death of W. T. McGinnis, then you will find for the plaintiff and assess the damages as hereinafter directed, unless you should find for the defendant under other instructions given you in this charge.' "

First Proposition under Fifteenth Assignment.

This charge was erroneous and imposed too great a burden upon the defendant in this, that under said charge a verdict against it was warranted if the jury found that the switch was loose or open, without regard to the cause thereof. The railway company was not an insurer of the condition of the switch. Its only obligation was to exercise ordinary care to see that same was in a reasonably safe condition.

295 Second Proposition under Fifteenth Assignment.

This charge was erroneous and had no evidence to sustain it in this, that there was no evidence which warranted the submissioin of the issue as to the failure of the defendant to inspect the switch and roadbed.

Third Proposition under Fifteenth Assignment.

This charge imposed too great a burden upon the defendant, this being a suit for the death of an employee, in this, that the fact that the switch-point had become defective, if it was, would not render the defendant liable. Such defect, if any there was, in and of itself was not negligence as to the deceased, and in order to make same actionable it was necessary to show that the defect had existed for such length of time as that same should have been discovered, or that could have been discovered by reasonable inspection. The evidence was silent on this issue.

Statement.

We respectfully refer to the testimony of the witnesses, and each of them, as same appears in the Seventh and Eighth assignments, without the necessity of repetition.

The Sixth paragraph of the Court's Charge is correctly set out in this assignment. (Tr. 18.)

Sixteenth Assignment of Error as a Proposition.

The Court of Civil Appeals erred in refusing to set aside its judgment herein and grant the appellant a rehearing on the Twenty-seventh ground of its motion therefor, which was as follows:

296 "The Court erred in holding that the various charges of the court explaining the law of this case and applying the issues thereto were not contradictory and left the jury without any guide. There is no possible way to harmonize the views of the law as expressed by the trial court in the sixth and ninth paragraphs of its main charge with those expressed in the fifth special charge given at the request of the defendant. These charges were plainly contradictory; that is, the paragraphs in the main charge given were contradictory to the special charge given. If it was the law as given in charge in the fifth special charge, then the defendant was entitled to a verdict. If said charge did not express the law, yet the jury had no criterion to guide it, as it could not tell what the views of the court was as to the law."

Statement.

We respectfully refer to the statement appearing under the Fourth assignment.

Wherefore, Plaintiff in Error presents this, its application for a writ of error, and has deposited at the same time of the filing thereof a true copy of the same with the Clerk of the Court of Civil Appeals, and has notified the Hon. A. L. Curtis and the Hon. Winbourn Pearce, Attorneys of Record for the Defendant in Error, of the deposit of said copy with the Clerk. Your petitioner therefore asks that said writ of error be granted, and that the judgment of the District Court of Bell County against your petitioner and the judgment of the Court of Civil Appeals for the Third Supreme

Judicial District affirming same be reversed and cause rendered or remanded, as to the Court may seem necessary, and to which your applicant may show itself entitled.

Respectfully submitted,

TERRY, CAVIN & MILLS,
A. H. CULWELL,
Attorneys for Gulf, Colorado and Santa Fe Railway Company, Plaintiff in Error.

297 Endorsed: App. No. 7828. Gulf Colorado & Santa Fe Ry. Co. Plaintiff in Error, vs. Mary J. McGinnis, Admx., Deft. in Error. Petition for Writ of Error. Refused. Filed in Court of Civil Appeals 3rd Supreme Judicial District, Austin, Texas, June 5, 1912. R. H. Connerly, clerk. Filed in Supreme Court, June 6, 1912. F. T. Connerly, Clerk.

Certificate of Clerk of Supreme Court.

Clerk's Office, Supreme Court.

I, F. T. Connerly, Clerk of the Supreme Court of Texas, do hereby certify that the above and foregoing eighty-seven pages contain a true and correct copy of the Original Petition for Writ of Error to the Supreme Court of Texas, now on file in this Office, in App. No. 7828, Gulf, Colorado & Santa Fe Railway Company, Plaintiff in error vs. Mary J. McGinnis, Administratrix, Defendant in error Witness my hand and the seal of said court, this the 20th day of July, A. D. 1912.

[SEAL.] (Signed) F. T. CONNERLY, *Clerk.*

(Endorsed:) Filed in Court of Civil Appeals of the Third Supreme Judicial District of Texas, July 20th. 1912. (Signed) R. H. Connerly, Clerk.

298 *Judgment of Supreme Court of Texas.*

In Supreme Court of Texas.

G., C. & S. F. Ry Co.
vs.
Mary J. McGinnis et al.

From Bell County, Third District.

June 26th, 1912.

This day came on to be heard the application of G. C. & S. F. Ry. Co., for a writ of error to the Court of Civil Appeals for the Third District, and the same having been duly considered, it is ordered that said application be refused. That the applicant Gulf, Colorado & Santa Fe Railway Company and its sureties, H. O. Stein and Geo. Sealy, pay all costs incurred on this application.

I, F. T. Connerly, Clerk of the Supreme Court of Texas, hereby certify that the above is a true and correct copy of the judgment rendered by the Supreme Court on the application for writ of error in the above styled cause.

Witness my hand and the seal of said court, this the 1st day of July, A. D. 1912.

[SEAL.] F. T. CONNERLY, *Clerk*,
By J. S. MYRICK, *Deputy*.

(Endorsed:) Application No. 7828; G. C. & S. F. Ry. Co., vs. Mary J. McGinnis, Adm'r et al. Copy of judgment in Supreme Court. Application for writ of error refused. Filed in Court of Civil Appeals, Third Supreme Judicial District, Austin, Texas. July 1st, 1912. R. H. Connerly, Clerk.

299 *Bill of Costs in Supreme Court of Texas.*

No. 7828.

G., C. & S. F. Ry Co.
vs.
MARY J. MCGINNIS et al.

Clerk's Office, Supreme Court.

Certified Copy Bill of Costs Supreme Court.

Filing Application	.50
Docketing Petition	.50
Entering Appearance of Counsel	.50
Filing Two Briefs	.60
Filing Three Papers	.90
Entering Orders	.50
Entering Judgment on Application	1.00
Certified Copy of Judgment	1.00
Taxing Costs of Application	.50
Certified Copy Bill of Costs	1.00
Total	$7.00

I, F. T. Connerly, Clerk of the Supreme Court of Texas, hereby certify that the above copy of the original bill of costs is true and correct.

Witness my hand and seal of said Court at Austin, this the 1st day of July, 1912.

[SEAL.] F. T. CONNERLY, *Clerk*.

(Endorsed:) Application No. 7828. Certified Copy Bill of Costs in Supreme Court, Austin. G. C. & S. F. Ry. Co., vs. Mary J. McGinnis et al. $700. Filed in Court of Civil Appeals, Third Supreme Judicial District, Austin, Texas. July 1st, 1912. R. H. Connerly, Clerk.

300 Clerk's Office, Court of Civil Appeals of the Third Supreme Judicial District of Texas, at Austin, Texas.

I. R. H. Connerly, Clerk of the Court of Civil Appeals of the Third Supreme Judicial District of the State of Texas, do hereby ceritfy that the foregoing 299 pages contain true and correct copies of the proceedings had in the District Court of Bell County, Texas; the Court of Civil Appeals of the Third Supreme Judicial District of Texas and the Supreme Court of Texas, as the same appear from the records and papers now on file in my office in the case in said court numbered—4986—entitled—Gulf, Colorado & Santa Fe Railway Company, Appellant vs. Mrs. Mary J. McGinnis et al. Appellees, on appeal to said court from the District court of Bell County, Texas. Witness my hand and the seal of said court of Civil Appeals, this the 22nd day of July, A. D. 1912.

[Seal Court of Civil Appeals of the State of Texas.]

R. H. CONNERLY,
Clerk of the Court of Civil Appeals of the Third Supreme Judicial District of Texas.

301 GULF, COLORADO AND SANTA FE RAILWAY COMPANY,
Plaintiff in Error,
vs.
MARY J. MCGINNIS, Administratrix, Defendant in Error.

Petition for Allowance of Writ of Error.

To the Honorable the Supreme Court of the United States:

Comes the Gulf, Colorado and Santa Fe Railway Company by its Attorneys, J. W. Terry, A. B. Browne and A. H. Culwell, and complains that in the records and proceedings and also in the rendition of a judgment in a suit between the Gulf, Colorado and Santa Fe Railway Company, Appellant, and Mary J. McGinnis, Administratrix, Appellee, in the said Court of Civil Appeals for the Third Supreme Judicial District of Texas, being the highest Court of law or equity in said State in which a decision was rendered in said suit, the Supreme Court of Texas having denied to said Appellant its application for a writ of error presented therein and the said Court of Civil Appeals for the Third Supreme Judicial District of Texas being the Court which had the final custody of the record in said cause, and in which a final judgment was rendered against the said Appellant on the 24th day of April, 1912, and in which Plaintiff in Error's motion for a rehearing was overruled by said Court on the 15th day of May, 1912, wherein there was drawn in question the validity of a statute of the State of Texas under the facts of this case on the ground of its being repugnant to the laws of the United States on the same question and the decision was in favor of such, the validity of said statute, as same applied to the facts of this case, the same being known as Chapter 163, 29th Legislature of the State

of Texas and being "An Act to prescribe when the defense
302 of assumed risk shall and shall not be available when interposed by a person, corporation or receiver operating a railroad or street railway in any suit for damages for the death or personal injury of an employee, and declaring an emergency," said Act approved April 24th, 1905, in conjunction with the further act of the Legislature of the State of Texas, same being Chapter 10, First Called Session of the 31st Legislature, and being "An Act declaring corporations, receivers, or other persons operating railroads in this State, to be liable to employés for injuries received through the negligence of such employer, officer, agent or servant, or in case of death from such injury, to be liable to the surviving widow and children, or husband and children and mother and father of the deceased; and if none, then of the next of kin dependent upon such employés; prescribing the effect of contributory negligence and assumed risk upon the right of recovery; declaring void any contract, rule or regulation intended to enable the employer to limit liability; also providing that employer shall be entitled to set off against any claim any sum contributed by such employer to a fund provided for such cases and which was actually paid to the injured party, and exempting such recovery from the debts of the deceased, and providing that the recovery shall be apportioned by the jury, or court trying the case without a jury, among those entitled to recover; providing how and by whom suit may be brought, also that nothing in this Act shall impair any right under any other law of this State or of the United States or in any way interfere with any proceeding now pending in any court, and declaring an emergency," and wherein is drawn in question a right, privilege and immunity claimed under a statute of the United States, same being "An Act relating to the liability of common carriers by railroad to their employés in certain case," approved April
303 22nd, 1908, and being 35 Stat., 65 Ch. 149, Laws of the United States and the decision of the Court of Civil Appeals is and was against the right and privilege especially set up and claimed by Plaintiff in Error herein, it appearing without controversy that at the time of the accident out of which this suit arose deceased was killed while he was employed by Plaintiff in Error engaging in Commerce between the State of Texas and other states of the United States, and that deceased was an employee handling such interstate commerce at the time of his death, and it being claimed by said Plaintiff in Error that under the Act of Congress above and under the facts of this case the deceased, W. T. McGinnis, assumed the risk of the injuries which resulted in his death, and that under the Act of Congress, as above set up, the Defendant in Error herein has no cause of action against your petitioner, and that under the facts of this case in no event was the married daughter of the deceased entitled to recovery, and its exemption from liability under the terms of the Act of Congress, above mentioned, having been fully set up in the said Court of Civil Appeals and the said Court of Civil Appeals having denied to it the exemption from liability under said Act, as herein asserted, and your petitioner al-

leging, as it does, that the cause of action, if any, existing in favor of the Defendant in Error, is one arising alone and exclusively under and by virtue of an act of Congress, which act of Congress is the one above specified, all of which appears from the record and proceedings in the said suit; manifest error hath happened to the great damage of the Gulf, Colorado and Santa Fe Railway Company;

Wherefore, the said Gulf, Colorado and Santa Fe Railway Company, by its Attorneys, prays for the allowance of writ of error and such other process as may cause the same to be corrected by
304 the Supreme Court of the United States.

J. W. TERRY,
A. B. BROWNE,
A. H. CULWELL,
Attorneys for Gulf, Colorado and Santa Fe Railway Company, Plaintiff in Error.

Allowed by:
JOSEPH R. LAMAR,
Associate Justice of the Supreme Court of the United States.

Endorsed: Gulf, Colorado and Santa Fe Ry. Co., Plaintiff in Error, vs. Mary J. McGinnis, Adm'x, Defendant in Error. Filed in Court of Civil Appeals 3rd Supreme Judicial District, Austin, Texas, Aug. 14, 1912. R. H. Connerly, Clerk.

In the Court of Civil Appeals for the Third Supreme Judicial District of Texas.

GULF, COLORADO AND SANTA FE RAILWAY COMPANY, Plaintiff in Error,
vs.
MARY J. MCGINNIS, Administratrix, Defendant in Error.

In Error from the Court of Civil Appeals of the Third Supreme Judicial District of Texas.

305 To the Supreme Court of the United States:

Now comes the Gulf, Colorado and Santa Fe Railway Company, Plaintiff in Error, by its Attorneys, J. W. Terry, A. B. Browne and A. H. Culwell, and says that in the record and proceedings aforesaid there is manifest error in the judgment and decision of the Court of Civil Appeals of the Third Supreme Judicial District of the State of Texas, to-wit:

First.

The Court of Civil Appeals of the Third Supreme Judicial District of the State of Texas erred in holding that the Plaintiff in Error herein was liable in damages for the death of W. T. McGin-

nis, and in failing to hold that the deceased assumed the risk of the injuries received by him, and of the danger thereof, under the Federal Employers Liability Act, same being the act approved April 22, 1908, 35 Stat., 65 Ch. 149, as applied to the facts of this case.

Second.

The Court of Civil Appeals of the Third Supreme Judicial District of Texas erred in overruling and failing to sustain the Twenty-first assignment of error presented in that Court, said assignment complaining as it did of the failure of the trial court to grant it a new trial, and being as follows:

"The Court erred in failing and refusing to set aside the verdict returned herein, and in failing to give the defendant a new trial on the fifteenth ground of its amended motion therefor, which was as follows:

" 'The evidence shows without conflict that it was not usual or customary under normal conditions to inspect the track, switches and switch-stands in the night time; that the conditions at the time of this wreck were normal; that the switch in question was located on straight track, on level ground, in a clear country; that there had been no rainfall for some time previous to the accident which made it necessary or proper to keep track walkers doing service in the night time; that there were no usual circumstances in
306 being, which rendered it expedient for the defendant to have the switches and switch-stands inspected in the night time; that it was well known and well understood by all operatives of trains, including the deceased, that under normal conditions, the track, switches and switch-points were not and would not be inspected in the night time; that the deceased knew on the night in question, or it is fair to assume that he knew that the switch and switch-stand at the point in question had not been inspected later than 6 o'clock on the afternoon before. Under this state of the evidence, the deceased clearly assumed all risks growing out of the failure to inspect the track, switches and switch-stand during that night.

" 'It was one of the ordinary risks of the service, well known by all engineers, and for each and all of these reasons the verdict of the jury is against the manifest weight and great preponderance of the testimony.' "

Third.

It having been admitted that this suit was maintained under the Federal Employers' Liability Act, and that the rights and liability of the parties are to be determined by that act, the Court of Civil Appeals of the Third Supreme Judicial District of Texas erred in holding that the Plaintiff in Error was liable for its failure to inspect its track and switches at night (which failure was the only theory upon which, under the evidence, the Court of Civil Appeals could have affirmed the judgment herein), and that the deceased did not assume the risk growing out of the failure of the Plaintiff in Error to inspect its track and switches in the night time. The

Assumed Risk Statute of Texas, known as Ch. 163, 29th Legislature of the State of Texas, approved April 4, 1905, is wholly inapplicable, as under the Federal Employers' Liability Act, as applied to the facts of this case, the deceased did assume all risk growing out of the failure of the Railway Company to inspect its track and switches in the night time.

307 **Fourth.**

The Court of Civil Appeals of the Third Supreme Judicial District of Texas erred in holding that the trial court committed no error in failing and refusing to give to the jury Plaintiff in Error's Special Charge No. 10, which was as follows:

"You are charged that you cannot find any damages in favor of Nelta Saunders, alleged to be a daughter of W. T. McGinnis, because the proof shows that she is a married woman, and is supported by her husband, X. B. Saunders, and there is no proof that she had any expectation of any pecuniary assistance from her said father, W. T. McGinnis, nor is there any allegation in the petition that she had any expectation of such assistance if her father had lived."

Fifth.

The Court of Civil Appeals of the Third Supreme Judicial District of Texas erred in holding that the trial Court committed no error in failing and refusing to set aside the verdict returned on the ninth ground of the amended motion for a new trial, which was as follows:

"In no event should a verdict have been returned in favor of Nelta Saunders. The evidence showed that she was a married woman, who was supported by her husband, and there was no evidence showing, or tending to show, that she received any contributions from her father, or that she would likely receive such contributions in the future. Judgment, therefore, awarding her damages was without evidence to sustain it, and same should be set aside,"

and said Court of Civil Appeals erred in holding that under the Federal Employers' Act plaintiff in Error would be and is liable in damages to the married daughter of the deceased whether such daughter received contributions from the deceased, or had expectation in the future of so doing, or not.

Respectfully submitted,

J. W. TERRY,
A. B. BROWNE,
A. H. CULWELL,
Attorneys for Plaintiff in Error, Gulf, Colorado and Santa Fe Railway Company.

308 Endorsed: Gulf, Colorado and Santa Fe Ry. Co., Pl'ff in Error, vs. Mary J. McGinnis, Adm'x, Def't in Error. Assignments of Error. Filed in Court of Civil Appeals 3rd Supreme Judicial District, Austin, Texas, Aug. 14, 1912. R. H. Connerly, Clerk.

GULF, COLORADO AND SANTA FE RAILWAY COMPANY, Plaintiff in Error,

vs.

MARY J. McGINNIS, Administratrix, Defendant in Error.

Know all men by these presents, That, we, the Gulf, Colorado and Santa Fe Railway Company, as principal, and Geo. Sealy and Sealy Hutchings, as sureties, are held and firmly bound unto Mary J. McGinnis, Administratrix, in the full and just sum of Fifteen Thousand Dollars ($15,000.00) to be paid to the said Mary J. McGinnis, Administratrix, to which payment well and truly to be made we bind ourselves, our heirs, executors, administrators and successors jointly and severally by these presents.

Sealed with our seals and dated this 29th day of July, 1912.

Whereas, lately at a term of the Court of Civil Appeals of the Third Supreme Judicial District of the State of Texas in a suit pending in said Court between the Gulf, Colorado and Santa Fe Railway Company, Appellant, and Mary J. McGinnis, Administratrix, Appellee, a judgment was rendered against the Gulf,
309 Colorado and Santa Fe Railway Company and in favor of the said Mary J. McGinnis, Administratrix, in cause number 4986 on the docket of said Court of Civil Appeals of the Third Supreme Judicial District, by which judgment the judgment of the District Court of Bell County, State of Texas, was affirmed and in which cause the Supreme Court of the State of Texas has denied to the said Gulf, Colorado and Santa Fe Railway Company its petition for a writ of error, and the said Gulf, Colorado and Santa Fe Railway Company having obtained a writ of error, filed a copy thereof in the Clerk's office of the said Court to reverse the judgment in the aforesaid suit, and citation directed to the said Mary J. McGinnis, Administratrix, citing and admonishing said Mary J. McGinnis, Administratrix, to be and appear at a Supreme Court of the United States to be holden at Washington within Thirty (30) days from the date hereof; now the condition of the above obligation is such that if the Gulf, Colorado and Santa Fe Railway Company shall prosecute said writ of error to effect and answer all damages and costs, if it fail to make its plea good, then the above obligation to be void, else to remain in full force and virtue.

Sealed and delivered in the presence of—

GULF, COLORADO AND SANTA FE RAILWAY COMPANY,
By TERRY, CAVIN AND MILLS,
Its Solicitors.

GEO. SEALY.
[SEAL.] SEALY HUTCHINGS.

Attest:
A. D. TORBERT,
Secretary Gulf, Colorado and Santa Fe Railway Company.

July —, 1912.

Approved by—
J. R. LAMAR,
Associate Justice Supreme Court of the United States.

310 Writ to operate as a supersedeas.

J. R. LAMAR,
Associate Justice S. C. U. S.

I, Geo. Sealy, do swear that I am worth in my own right at least the sum of Fifteen Thousand Dollars ($15,000.00) after deducting from my property all that which is exempted by the Constitution and Laws of the State from forced sale, and after the payment of all my debts of every description, whether individual or security debts, and after satisfying all encumbrances on my property which are known to me; that I reside in Galveston County, State of Texas, and have property in said State liable to execution worth more than Fifteen Thousand Dollars ($15,000.00).

GEO. SEALY.

Sworn to and subscribed before me this 29th day of July, A. D. 1912.

[SEAL.] CHAS. T. PECK,
Notary Public in and for Galveston County, Texas.

I, Sealy Hutchings, do swear that I am worth in my own right at least the sum of Fifteen Thousand Dollars ($15,000.) after deducting from my property all that which is exempted by the Constitution and Laws of the State from forced sale, and after payment of all my debts of every description, whether individual or security debts, and after satisfying all encumbrances on my property which are known to me; that I reside in Galveston County, State of Texas, and have property in said State liable to execution worth more than Fifteen Thousand Dollars ($15,000.00).

SEALY HUTCHINGS.

311 Sworn to and subscribed before me this 29th day of July, A. D. 1912.

[SEAL.] CHAS. T. PECK,
Notary Public in and for Galveston County, Texas.

Endorsed: Gulf, Colorado and Santa Fe Ry. Co., Pl'ff in Error, vs. Mary J. McGinnis, Adm'x, Def't in Error. Writ of Error Bond. Filed in Court of Civil Appeals 3rd Supreme Judicial District, Austin, Texas, Aug. 14, 1912. R. H. Connerly, Clerk.

312 *Bill of Costs in Court of Civil Appeals.*

Filing Record	.50
Docketing Cause	.50
Appearances	1.00
Filing and entering motion	.35
Orders	2.00
Filing 22 extra papers	2.20
Judgment	1.00
Taxing costs	.50

Mandate	1.50
Recording opinion	7.20
Certified copy bill of costs	.75
Certified copy orders to the Supreme Court	2.00
Notices, (15)	7.50
Copy of motion	5.70
Issuing precept	1.00
Sheriff's fee	1.00
Supreme Court costs	7.00
Transcript to Sup. Court U. S.	162.60
Certificate	.50
Expressage of transcript to Washington D. C., prepaid	1.15
12 extra pages added to transcript	6.00
	$211.95

313 *Additional Certificate.*

I, R. H. Connerly, Clerk of the Court of Civil Appeals of the Third Supreme Judicial District of Texas do hereby certify that the 12 pages immediately foregoing this certificate contain true and correct copies of the Petition to the Supreme Court of the United States for allowance of writ of error; Assignments of error in said Supreme Court of the United States and the bond for writ of error therein, together with a copy of the bill of costs in the Court of Civil Appeals of the Third Supreme Judicial District of Texas, and that the original writ of error and citation in error, from the Supreme Court of the United States of America are attached hereto immediately after this certificate, as the same appear of record from the files of my office in the case in said court entitled—No. 4986. Gulf, Colorado & Santa Fe Railway Company, Appellant, vs. Mrs. Mary J. McGinnis et al., Appellees. Appeal from Bell County.

Witness my hand and the seal of said court this the 15th day of August, A. D. 1912.

[Seal Court of Civil Appeals of the State of Texas.]

R. H. CONNERLY,
Clerk of the Court of Civil Appeals of the Third Supreme Judicial District of Texas.

314 GULF, COLORADO AND SANTA FE RAILWAY COMPANY, Plaintiff in Error,

vs.

MARY J. MCGINNIS, Administratrix, Defendant in Error.

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

President of the United States to the onorable the Judges of the Court of Civil Appeals of the Third Supreme Judicial District of Texas, at Austin, Texas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Civil Appeals of the Third Supreme Judicial District of Texas before you, or some of you, being the highest Court of law or equity of the said State in which a decision could be had in said suit between the Gulf, Colorado and Santa Fe Railway Company, Appellant, and Mary J. McGinnis, Administratrix, Appellee, being numbered 4986 on the docket of the said Court of Civil Appeals of the Third Supreme Judicial District of Texas, wherein was drawn in question a right, privilege and immunity claimed under a statute of the United States and the decision was against such, the right, privilege and immunity so claimed, and wherein was drawn in question the validity of a statute of or an authority exercised under said State on the ground of their being repugnant to the Constitution and Laws of the United States and the decision was in favor of such, their validity, and wherein was drawn in question the construction of a statute of the United States and the decision was against the right, privilege or exemption especially set up or claimed under such statute; and manifest error hath happened to the great damage of the said Gulf, Colorado and Santa Fe Railway Company as by *this* complaint appears, we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties afore-
315 said in this behalf, do command you, if judgment be therein given, that then under your seal distinctly and openly you send the record and proceedings aforesaid with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within Thirty (30) days from the date hereof in the said Supreme Court, to be then and there held that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the

United States, the 8th day of August, in the Year of Our Lord One Thousand Nine Hundred and Twelve.

[Seal of the Supreme Court of the United States.]

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

To operate as a supersedeas on furnishing bond for Fifteen Thousand Dollars ($15,000.00).

Allowed by:

JOSEPH R. LAMAR,
Associate Justice Supreme Court of the United States.

316 [Endorsed:] Gulf, Colorado & Santa Fe Ry. Co., pl'ff in Error, vs. Mary J. McGinnis, Admr, D'f't in Error. Writ of Error. Filed in Court of Civil Appeals, 3rd Supreme Judicial District, Austin, Texas, Aug. 14, 1912. R. H. Connerly, Clerk.

317 GULF, COLORADO AND SANTA FE RAILWAY COMPANY, Plaintiff in Error,

vs.

MARY J. McGINNIS, Administratrix, Defendant in Error.

Citation in Error.

The President of the United States to Mary J. McGinnis, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States to be holden at Washington within Thirty (30) days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the Court of Civil Appeals of the Third Supreme Judicial District of Texas at Austin, Texas, wherein the Gulf, Colorado and Santa Fe Railway Company is Plaintiff in Error and you are Defendant in Error, said cause being numbered 4986 on the docket of the said Court of Civil Appeals of the Third Supreme Judicial District of Texas, to show cause, if any there be, why the judgment rendered against said Plaintiff in Error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Joseph R. Lamar, Associate Justice of the Supreme Court of the United States, this, the 26th day of July, in the Year of our Lord One Thousand Nine Hundred and Twleve.

JOSEPH R. LAMAR,
Associate Justice of the Supreme Court of the United States.

318 On this 13th day of August, in the Year of Our Lord, One Thousand Nine Hundred and Twelve personally appeared J. B. Blair, Sheriff of Bell County, Texas, before me, a Notary Public

in and for Bell County, Texas and makes oath that he delivered a true copy of the within citation to Hon. A. L. Curtis, who is the Attorney of Record of the within named Mary J. McGinnis, Administratrix, defendant in error.

J. B. BLAIR,
Sheriff of Bell County, Texas.

Sworn to and subscribed before me this 13th day of August, in the Year of Our Lord Nineteen Hundred and Twelve by the said J. B. Blair, affiant.

[Seal Notary Public, Bell County, Texas.]

N. P. WOODWARD,
Notary Public in and for Bell County, Texas.

319 [Endorsed:] Gulf, Colorado & Santa Fe Ry. Co., Pl'ff in Error, vs. Mary J. McGinnis, Adm'r, Def't in Error. Citation in Error. Filed in Court of Civil Appeals, 3rd Supreme Judicial District, Austin Texas, Aug. 14, 1912. R. H. Connerly, Clerk.

Endorsed on cover: File No. 23,337. Texas Court of Civil Appeals, 3d Supreme Judicial District. Term No. 762. Gulf, Colorado & Santa Fe Railway Company, plaintiff in error, vs. Mary J. McGinnis, administratrix of the estate of W. T. McGinnis, deceased. Filed August 19th, 1912. File No. 23,337.

File No. 23,337.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 762.

GULF, COLORADO & SANTA FE RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

MARY J. McGINNIS, ADMINISTRATRIX OF THE ESTATE OF W. T. McGINNIS, DECEASED.

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 17, 1912.

(Record, Page 9.)

STATE OF TEXAS,
County of Bell:

In the District Court of Bell County, Texas, June Term, A. D. 1911.

To the Hon. John D. Robinson, Judge of said Court:

Now comes Mary J. McGinnis, Administratrix, who resides in Bell County, Texas, hereinafter called plaintiff, leave of the court being first had and obtained and files this her second amended petition in lieu of and as a substitute for her first amended petition filed in this court on June 23rd, 1910, complaining of the Gulf, Colorado & Santa Fe Ry. Co., hereinafter styled defendant; and for cause of action, plaintiff represents to the court that defendant is a railroad corporation, duly incorporated and organized under the laws of the State of Texas, and is and has been for many years past doing business, and has its local office in Belton, Bell County, Texas, and H. M. Woodruff is its local agent, who resides in Bell County.

Plaintiff alleges that she is the duly appointed, qualified and acting administratrix of the estate of W. T. McGinnis, deceased, that she was appointed such administratrix by the county judge of Bell County, Texas, sitting in probate, and that she duly qualified as such and has taken the oath and made the bond required by law, that the court in making its order or appointment aforesaid conferred full power and authority upon her to institute and prosecute this suit. And that letters of administration have been issued to her.

Plaintiff alleges that she is the surviving wife of W. T. McGinnis, deceased, and that Lyle McGinnis, Lamar McGinnis and Laland McGinnis and Nelta Saunders are the children of plaintiff and the said W. T. McGinnis, deceased, and that said W. T. McGinnis left surviving him no other child or children; that said Laland McGinnis is a minor, a boy, about 19 years of age, and the said Lyle McGinnis is a girl, a minor about 13 years of age, and the said Lamar McGinnis is a minor, a boy about three years of age, all of which children reside with plaintiff in Bell County, Texas; that Nelta Saunders is the wife of X. B. Saunders, and resides with her husband in Bell County, Texas;

The plaintiff brings this suit for the use and benefit of herself and the children above mentioned.

Plaintiff further alleges that heretofore, to wit: on or about the 6th day of October, A. D. 1909, defendant was engaged in running and propelling cars for the convenience of passengers and freight over the railroad owned by it, and running through the county of Bell as aforesaid; that on said day and for a long time prior thereto the said W. T. McGinnis, deceased, was engaged as a locomotive engineer in the service of defendant, and on or about said day,

in the night time, was performing his usual duties as such engineer on a south bound passenger train, out of Temple, and while engaged in such services, the engine and train upon which he was engaged in work, was derailed and caused to leave the track, at and near Silenus, about three miles southeast of Temple in Bell County, Texas, and on account of the said derailment of said engine and train, the said W. T. McGinnis, deceased, sustained serious injuries, which resulted in his death.

Plaintiff further alleges that at the time and place of said injury, as aforesaid, the defendant negligently and carelessly failed to provide a safe track and road bed for said train to run over, and negligently and carelessly failed to provide and furnish a safe engine and cars and safe machinery in, about and upon the train upon which the said W. T. McGinnis was engaged in the performance of his duties; that the defendant carelessly and negligently permitted its said track and switch, located at this point, to be and remain in said dangerous condition, and permitted said switch to be and remain open at said place, and permitted its rails to become out of alignment at said point, and permitted its switch point to become worn away, broken off and defective, and carelessly and negligently permitted the wheels upon the engine, which the said W. T. McGinnis was running to become worn and the flanges on the same to become and remain sharp and in such condition that said engine would easily leave the track, and that the same was very dangerous, and negligently permitted the said switch to become loose and to remain in such condition, and permitted all the other parts in and about said engine to be and remain in a defective condition, worn and out of repair, and said defendant had carelessly and negligently failed to inspect its track and switch, and its said engine and the wheels thereof, and had negligently and recklessly failed to discover the state of its said switch and track and engine and had failed to repair and remedy the same, and had failed to provide any warning to the said W. T. McGinnis of the fatally dangerous condition thereof, and on account of said defendant's negligence in the premises, said train was derailed and W. T. McGinnis was injured as aforesaid.

Plaintiff further alleges that the negligence of the defendant, as aforesaid, was the direct and proximate cause of the derailment of said train, and of said W. T. McGinnis' injuries and of his death.

Plaintiff further alleges that at the time of his death as aforesaid, which death occurred on or about the 6th day of October, 1909, the said W. T. McGinnis was 51 years of age, and in good health and well qualified for the discharge of his business; that he was an experienced locomotive engineer and well qualified for the pursuit of his occupation, and at the time of his death, and for a long time prior thereto he did thereby earn and receive therefrom the sum of $3,000 per annum, and could and would have continued the same during the term of his natural life; that he had since his marriage with his wife worked for the support of his family, consisting of this plaintiff and their said children, and provided them with all necessaries and conveniences of life, and would have educated the

children above mentioned in a manner suitable to his station in life; that said W. T. McGinnis owned no property at the time of his death and was dependent upon his earnings for the support of himself and of his family; that plaintiff and the children of said W. T. McGinnis owned no property, and were before his death entirely dependent on him for their maintenance and the education of the said children;

Plaintiff further alleges that the said W. T. McGinnis sustained his said injuries without any fault or negligence on his part, and at the time of the derailment of said train he was wholly unaware of the danger and peril which confronted him.

Plaintiff alleges that by reason of the premises, she and her said children have sustained actual damages in the sum of Seventy Five Thousand Dollars.

Wherefore, plaintiff prays the court that they have judgment for the sum of Seventy Five Thousand ($75,000) Dollars damages; that they be apportioned among the parties entitled thereto, in such shares, as the court or jury may find and for cost of suit and such other and further relief, special and general, in law and equity, as they may show they are entitled to receive.

WINBOURNE PEARCE &
A. L. CURTIS,
Attorneys for Plaintiff.

Filed June 5, 1911.

E. E. UPSHAW, *District Clerk, Bell County, Texas,*
By TOM S. SAUNDERS, *Deputy.*

(Record, Page 13.)

In the District Court of Bell County, Texas.

No. 7577.

Mrs. Mary J. McGinnis et al.
vs.
Gulf, Colorado & Santa Fe Railway Company.

Now comes the defendant, and, leave of the court first obtained, files this, its second amended original answer, in lieu of its first amended original answer heretofore filed, and by way thereof excepts to plaintiff's third amended petition and says same is not good in law, shows no cause of action and of this is prays judgement.

I.

Defendant specially excepts to said petition and says that plaintiffs are not entitled to recover in the way and manner that the suit is filed and that they are not entitled to judgment herein, nor any relief under and by reason of said petition.

II.

Defendant specially excepts to the third paragraph of said petition, beginning with the line "Plaintiff alleges that she is the sur-

viving wife of W. T. McGinnis, deceased," because same is wholly immaterial and such allegations have no place in this suit.

III.

Defendant specially excepts to those allegations relative to the support rendered by deceased to his family, as well as to the allegations to the effect that he had no property, and likewise to the allegations that plaintiff and the children had no property, because each and all of said allegations are immaterial; they present no issue of fact or law, could not be made the basis of recovery and are wholly irrelevant, and on each and all of the above exceptions defendant prays judgment.

For answer defendant denies each and singular the allegations in said petition contained, says same are not true in fact and of this puts itself upon the country.

For special answer, if required, defendant says that plaintiff ought not to recover for this:

1. That if the accident occurred at the time and place charges in plaintiff's petition, that same was the result of one of the risks assumed by the deceased as a locomotive engineer and such assumption of risk is here plead in bar of any recovery.

2. Defendant represents that it, at the time of this accident, was engaged as a common carrier by railroad in commerce between the States of the Union; that the train of which deceased was the engineer, was handling commerce which had originated beyond the limits of the State of Texas; that said train was a through passenger train and had thereon passengers who had started on trips at points beyond the limits of the State of Texas; that said train was hauling cars which had come from points beyond the limits of the State of Texas in a continuous journey, and said train was handling United States mail which had originated at points beyond the limits of the State of Texas; that said train was also carrying baggage and express which had originated at points beyond the limits of the State of Texas; that the passengers above mentioned, the cars, the mail the baggage and express above set out was being carried in a continuous route from points of origin beyond the limits of the State of Texas, to points of destination within the State of Texas, and that the deceased was employed at the time of the accident, by the defendant in interstate commerce; that the defendant company was an interstate carrier and the deceased was employed by it as a locomotive engineer, engaged at the time in the handling and carrying of interstate commerce.

These facts are plead in bar of any recovery herein, defendant alleging that plaintiffs have no cause of action under the laws of the State of Texas, and that no relief can be afforded to them by any proper order of this court and on the coming of the facts as above alleged, defendant asks for its judgment.

3. Defendant represents that under the facts of this case, plaintiffs' cause of action, if any they have, which is denied, however, arises solely and alone and same must be determined solely and alone by and under the laws of the United States, and not by the laws of

the State of Texas. Defendant here represents that when the facts are heard, that same will show that this defendant, a common carrier by railroad, was engaged in interstate commerce at the time of the accident out of which this suit arose, and that deceased was an employee of said defendant as a locomotive engineer, running said train, which contained interstate traffic and cars, and said deceased was therefore engaged in interstate commerce, and these facts are now plead in bar of any judgment in favor of the plaintiffs or either of them, and defendant further represents that under this statement of the case, that said plaintiffs nor either of them are entitled to have or to maintain this cause of action.

4. Defendant represents that plaintiff ought not to be permitted to recover herein, for this, that it had exercised ordinary care to provide deceased with an engine that was reasonably safe for the purpose intended and had exercised a like degree of care to furnish him with a track and roadbed that was reasonably safe; that it had caused frequent and careful inspection to be made of the track and switch at the place of accident and had likewise caused frequent and careful inspections to be made of the engine that deceased was using at the time of the derailment; that such inspections which were made by competent employés, had failed to discover any defect in either the engine or the track, and that there were no defects in either of them that could have been ascertained by the exercise of the care required of the defendant and this defendant alleges that the accident, out of which this suit arose, was not the result of any defect in the track, roadbed, switches, cross-overs or any portion of the equipment or appliances; that all of same were in good condition.

Defendant represents that this accident occurred in the night time; that it was not customary, usual or necessary that inspectors be maintained to inspect railroad tracks during the night time or to have track walkers in the night time and all of these facts were well known to the deceased, who knew that no inspection was made of the track, except in the day time.

Defendant says that the switch light at the point of the accident showed that the track was in good condition, the switches properly set, but in fact defendant says that the switch at the point of the accident had been misplaced so as to wreck a train going in the direction in which this train was going at the time of the derailment. The act in misplacing said switch was the work of designing persons, intent upon mischief; that it was not the result of any negligence on the part of said railway company or any of its employés; that the condition at the time of wreck was occasioned by the wilful act of a vicious, evil-minded, designing person or persons; that neither this defendant nor any of its officers or employees knew that this switch had been thrown or *or* partially thrown at any time after same occurred until the train was wrecked, and that they had no reason to suppose that the switch had been misplaced or in any manner tampered with; that this defendant alleges the facts to be that said switch had been tampered with and that too after the hour of 6 p. m. on the night of the accident.

Defendant, charging as it does, the facts to be as above set out,

represents that it is not responsible to the plaintiffs for the death of deceased under these circumstances. That these facts constitute and are a complete defense to this cause of action, and same are here now plead in bar of any recovery.

Defendant having fully answered, asks to be dismissed with its costs.

JNO. M. FURMAN,
A. H. CULWELL,
Attorneys for Defendant Gulf, Colorado & Santa Fe Railway Company.

Filed June 5th, 1911.

E. E. UPSHAW, *District Clerk, Bell County, Texas,*
By TOM S. SAUNDERS, *Deputy.*

(Record, Page 17.)

In the District Court of Bell County, Texas, June, A. D. 1911.

No. 7577.

MARY J. MCGINNIS
vs.
G., C. & S. F. RY. CO.

GENTLEMEN OF THE JURY: The plaintiff, Mrs. Mary J. McGinnis, brings this suit as administratrix of the estate of W. T. McGinnis, deceased, and she alleges that she has been duly appointed by the county court of Bell County and has qualified as such administratrix as required by law.

She alleges that as such administratrix she brings this suit for the benefit of herself as the surviving wife of W. T. McGinnis and for the benefit of the children of herself and W. T. McGinnis, deceased, towit: Laland McGinnis, a boy nineteen years old; and Lyle McGinnis, a girl thirteen years old; and Lamar McGinnis, a boy about three years old; and Nelta Saunders, wife of X. B. Saunders.

Plaintiff alleges that the death of the said W. T. McGinnis occurred at Silenus about three miles southeast of Temple, in Bell County, Texas, on or about the 6th day of October, 1909, and was caused by the negligence of the defendant company in that it carelessly failed to provide a safe track and roadbed for the train which W. T. McGinnis was then upon as an engineer in the service of defendant, to run over, and negligently and carelessly permitted its said track and switch located at Silenus to be and remain open at said place, and permitted its switch point to become worn away, broken off, and defective and negligently permitted its said switch to become loose and to remain in such condition, and negligently and carelessly failed to inspect its track and switch, and had negligently failed to discover the condition of its said switch and track, and had failed to repair and remedy the same, and had failed to provide any warning to the said W. T. McGinnis of the dangerous

condition thereof, and that on account of said negligence the said train was derailed and that W. T. McGinnis sustained injuries which resulted in his death.

Plaintiff alleges that the negligence complained of was the direct and proximate cause of the death of W. T. McGinnis, and that by reason thereof those for whose benefit she brings this suit have sustained injuries in the sum of seventy five thousand ($75,000) dollars, and for which she prays judgment.

The defendant answers by various pleas, and answers by denying each and singular the allegations in plaintiff's petition contained, and says that the same are not true in fact, and of this it puts itself upon the country.

And further the defendant specially answers:

(1) That if the accident occurred at the time and place charged in plaintiff's petition, that same was the result of one of the risks assumed by the deceased as a locomotive engineer;

(2) That defendant at the time of this accident was engaged in inter-state commerce as a common carrier, that the deceased was an engineer on a train that was engaged in interstate commerce and contained cars, passengers, baggage, mail and express which had originated at points beyond the limits of the State of Texas, and that the rights of the parties hereto are determined solely and alone by act of Congress, and that plaintiff is not entitled to predicate liability or maintain this action under any law or laws of the State of Texas.

(3) That defendant had exercised ordinary care to provide deceased with an engine that was reasonably safe for the purpose intended, and had exercised a like degree of care to furnish him with a track and roadbed that was reasonably safe, and that it had caused frequent and careful inspections to be made of the track and switch at the place of accident, and had likewise caused *caused* frequent and careful inspections to be made of the engine that deceased was using at the time of the derailment; that such inspections had been made by competent employees who had failed to discover any defect in either the engine or the track, and that there were no defects in either of them that could have been ascertained by the exercise of the care required of the defendant, and that the accident out of which this suit arises was not the result of any defect in the track, roadbed, switches, cross-overs, or any portion of the equipment or appliances, that all of same were in good condition.

Defendant further avers that some person intent upon mischief wantonly and wilfully interfered with and disarranged the switch and track and misplaced the switch so as to wreck a train going in the direction in which this train was going at the time of derailment, and alleges that said switch had been tampered with as aforesaid after the hour of six o'clock p. m. on the night of the accident, and that the defendant company had no reason to suppose that the switch had been misplaced or in any way tampered with, and that neither it nor any of its officers or employees knew that this switch had been thrown or partially thrown at any time after same occurred until the train was wrecked.

I give you in charge the following as the law applicable to this case.—

(1) Negligence is defined to be the want of ordinary care; that is, the want of such care as an ordinarily prudent person would have exercised under the same or similar circumstances.

(2) By proximate cause is meant an efficient cause without which the injury would not have happened and from which danger or injury might reasonably have been anticipated as a natural and probable consequence.

(3) An employee of a railroad company is held in law to assume such risks as are ordinarily incident to the service he engages to perform, and such others as he knows of or must necessarily have known of in the ordinary discharge of the duties of his service; but risks arising from the negligence of the company's servants or employees that are chargeable to it are not assumed by an employee, unless he knows of them or must necessarily have known of them in the ordinary discharge of the duties of his service.

(4) It is the duty of a railroad company to exercise ordinary care in the construction of its roadbed and switches, and to exercise ordinary care in inspecting and maintaining the same in a reasonably safe condition for the operation of its trains and if it fails to do so and injury thereby results, the same would be negligence for which it would be liable.

(5) Ordinary care is such care as an ordinarily prudent person would have exercised under the same or similar circumstances.

(6) Now if you believe from the evidence that the plaintiff Mrs. Mary J. McGinnis, is the duly qualified administratrix of the estate of W. T. McGinnis, deceased, and was the wife of W. T. McGinnis at the date of his death, and that Lyle McGinnis, Laland McGinnis and Lamar McGinnis were their minor children, and that Nelta Saunders was their married daughter, and if you further believe from the evidence that on or about the 6th day of October, 1909, in Bell County, Texas, the said W. T. McGinnis was in the employment of the defendant as a railway engineer, and as such was engaged in running one of the defendant's locomotives in the operation of one of defendant's passenger trains, and that while so employed in running said passenger train over its line of railway he ran his engine and train into a defective switch at Silenus, thereby causing the accident in question, and which resulted in the death of W. T. McGinnis; and if you further believe from the evidence that the switch point at said place had worn away, broken off and became defective, or if you find from the evidence that said switch point had become loose or open; and if you further find from the evidence that the defendant had failed to inspect its said switch and road bed, and had failed to warn W. T. McGinnis of the dangerous condition thereof (if it was dangerous and defective at the place in question at the time above specified) and if you further find that the defendant was negligent in permitting its switch to be and remain in such defective condition (if you find it was in a defective condition) And if you further find that it failed to exercise ordinary care to inspect said switch and track, and if you find that such

failure if any, was negligence as that term has been heretofore defined, and if you further find that such negligence, if any, was the direct and proximate cause of the death of W. T. McGinnis, then you will find for the plaintiff and assess the damages as hereinafter directed unless you should find for the defendant under other instructions given you in this charge.

(7) The burden is upon the plaintiff to prove by a preponderance of the evidence all of the facts necessary to make out a case for her recovery as submitted by the court in the next preceding paragraph of this charge, and unless such facts are so established you must find for the defendants.

(8) If you find that W. T. McGinnis was killed as alleged, but that the same was the result of risks ordinarily incident to his employment and such as was assumed by him in undertaking and continuing in the employment as such engineer, you will find for the defendant and so say by your verdict.

(9) If you believe from the evidence that the switch at Silenus was displaced or injured in any manner by explosion or otherwise by some person intent upon mischief, and that the same caused the accident that resulted in the death of W. T. McGinnis, and that defendant was not negligent in failing to discover the same, then you will find for the defendant.

(10) If you find for the plaintiff, then you will return a verdict in her favor as administratrix for such sum of money as damages as if paid in hand in cash at this time would be sufficient to fairly and justly compensate the persons for whose benefit this suit is brought for such pecuniary benefits as you may believe from the evidence they had a reasonable expectation of receiving from W. T. McGinnis, if any, from and after the date of the death of W. T. McGinnis, if his death had not been so occasioned.

(11) If you find for the plaintiff, the form of your verdict will be "We the jury, find for Mrs. Mary J. McGinnis, Administratrix, the sum of — Dollars as damages and we apportion the same as follows": You will then in your verdict apportion such amount between any or all of the persons for whose benefit this suit has been brought, stating in your verdict how much, if anything, you find for each of said persons.

If you find for the defendant, you will simply so say by your verdict.

You, the jury, are the exclusive judges of the credibility of the witnesses, of the facts proved, and of the weight to be given the testimony, but you are bound to receive the law from the court which is herein given you and be governed thereby.

JOHN D. ROBINSON,
Judge of the 27th Judicial District.

Filed June 7th, 1911. E. E. Upshaw, Clerk District Court, Bell County, Texas.

(Record, Page 22.)

We the jury find for Mrs. Mary J. McGinnis, administratrix, the sum of Fifteen Thousand $15,000 dollars as damages, and we apportion the same as follows: To Mrs. Mary J. McGinnis, Seven thousand and five hundred $7,500 dollars, Seven Thousand Five Hundred $7,500 dollars to be equally divided among the four children.

JOE B. FERGUSON, *Foreman.*

In the District Court of Bell County, Texas.

No. 7577.

MARY J. McGINNIS et al.,
vs.
GULF, COLORADO & SANTA FE RY. CO.

The defendant requests the court to charge the jury as follows: The jury are charged to return a verdict for the defendant.

TERRY, CAVIN & MILLS,
A. H. CULLWELL,
JOHN M. FURMAN,
Attorneys for the Defendant.

Refused.
JOHN D. ROBINSON,
Judge 27th Judicial District.

Filed June 7th, 1911. E. E. Upshaw, District Clerk, Bell County, Texas.

In the District Court of Bell County, Texas.

No. 7577.

MARY J. McGINNIS et al.,
vs.
GULF, COLORADO & SANTA FE RAILWAY COMPANY.

The jury is charged that if you believe that the accident was occasioned by the malicious interference with the switch stand by some evilly disposed person in the night time of the night on which the accident occurred, then your verdict should be for the defendant, unless you further find that the defendant knew of such interference or knew such facts in regard thereto as would put a person of ordinary prudence on inquiry.

J. M. FURMAN,
A. H. CULWELL,
Attorneys for the Defendant.

Refused.
JOHN D. ROBINSON,
District Judge.

Filed June 7th, 1911. E. E. Upshaw, District Clerk, Bell County, Texas.

In the District Court of Bell County, Texas.

No. 7577.

MARY J. MCGINNIS et al.,
vs.
GULF, COLORADO & SANTA FE RAILWAY COMPANY.

The defendant requests the court to charge the jury as follows:

The law does not define "ordinary care" further than that the same must be such care as a man of ordinary prudence would exercise under the same or similar circumstances. What would be ordinary care in one case might be gross negligence in another. And the care required of a railway company in inspecting and caring for a switch located in a curve on a down grade, at a point where such switch materially increased the hazard and danger of running a train, might be found by the jury to be much higher than in a case where a switch is a permanent part of the roadbed, and is located on a straight road and at grade. The true question for the jury in determining the degree of care required in the matter under consideration is, did the defendant exercise the same care in maintaining its switches at the point of the accident that a person of ordinary prudence and care would have exercised under the same or similar circumstances.

If you find that the defendant did exercise such care, then even though the death of engineer McGinnis was due to the accident, still the plaintiff is not entitled to recover, and if you so find you will find for the defendant.

TERRY, CAVIN & MILLS,
A. H. CULWELL,
JOHN M. FURMEN,
Attorneys for the Defendant.

Refused.
JOHN D. ROBINSON,
Judge 27th Judicial Dist.

Filed June 7th, 1911. E. E. Upshaw, District Clerk, Bell County, Texas.

Dist. Court.

MCGINNIS
vs.
SANTA FE.

If you believe that the deceased knew that it was not usual nor customary to have the switch stands, switches and track inspected under normal circumstances, in the night time, then you are charged that deceased assumed all of the risk growing out of such failure to so inspect, and plaintiff cannot recover because of the failure of the railroad company to so inspect.

JNO. M. FURMAN,
A. H. CULWELL,
For Def't.

Given to be considered by you in connection with the main charge

JOHN D. ROBINSON,
Dist. Judge.

Filed June 7th, 1911. E. E. Upshaw, Clerk District Court, Bell County, Texas.

Dist. Court.

McGINNIS
vs.
SANTA FE.

You are charged that if you find from the evidence that it was not usual nor customary to inspect the switches or track in the night time and that there was no circumstance to the defendant in the exercise of ordinary care to indicate that the switch and track at place of accident should have been inspected in the night time, then the defendant would not be guilty of negligence for its failure to so inspect.

JNO. M. FURMAN,
A. H. CULWELL,
For Def't.

We request the above charge to be given also.

A. L. CURTIS &
WINBOURN PEARCE,
Att'ys for Plaintiff.

Given:
JOHN D. ROBINSON.

Filed June 7th, 1911. E. E. Upshaw, District Clerk, Bell County, Texas.

In the District Court of Bell County, Texas.

No. 7577.

MARY J. McGINNIS
vs.
GULF, COLORADO & SANTA FE RAILWAY COMPANY.

The defendant asks the court to charge the jury as follows:

You are charged that you will disregard all the allegations in plaintiff's petition setting up negligence on the part of the defendant in having allowed its flanges on the wheels of its engine to become sharp, and in allowing its switch to remain unlocked, and in allowing its rails to remain out of alignment, and allowing its engines and cars to be defective; which allegations you will disregard in considering this case, as there has been no evidence introduced bearing on any of such allegations.

TERRY, CAVIN & MILLS,
A. H. CULWELL,
JOHN M. FURMAN,
Attorneys for Defendant.

Given to be considered by the jury in consideration with the main charge.

JOHN D. ROBINSON,
Dist. Judge.

Filed June 7th, 1911. E. E. Upshaw, Clerk District Court, Bell County, Texas.

In the District Court of Bell County, Texas.

No. 7577.

MARY J. MCGINNIS et al.
vs.
GULF, COLORADO & SANTA FE RY. CO.

The defendant requests the court to charge the jury as follows:

You are charged that the employee assumes all the risks ordinarily incident to the business in which he is engaged, and if you find that the death of W. T. McGinnis was caused by one of the risks ordinarily incident to the running of locomotive engines, and was not the result of any want of ordinary care on the part of the defendant in providing and maintaining reasonably safe tracks and switches for the running of its trains, then if you so find, you will find for the defendant.

TERRY, CAVIN & MILLS,
A. H. CULWELL,
JOHN M. FURMAN,
Attorneys for Defendant.

Given to be considered by you in connection with the main charge.

JOHN D. ROBINSON,
Dist. Judge.

Filed June 7th, 1911. E. E. Upshaw, District Clerk, Bell County, Texas.

In the District Court of Bell County, Texas.

No. 7577.

MARY J. MCGINNIS et al.
vs.
GULF, COLORADO & SANTA FE RY. CO.

The defendant asks the court to give the following special charge to the jury:

You are charged that the railway company is in no case an insurer of the safety of its employés, and if you find from the evidence that at the point of the accident the defendant company provided and maintained reasonably safe tracks and switches for the purpose of

conducting its business in operating its freight and passenger trains, and that the accident was solely the result of an injury to the switch caused by some evil-minded person, and not through any want of ordinary care on the part of defendant, then if you so find, you will find for the defendant.

TERRY, CAVIN & MILLS,
A. H. CULWELL,
JOHN M. FURMAN,
Attorneys for the Defendant.

Given to be considered by the jury in connection with the main charge.

JOHN D. ROBINSON,
Dist. Judge.

Filed June 7th, 1911. E. E. Upshaw, Clerk, District Court, Bell County, Texas.

In District Court, Bell County, June Term, 1911.

No. 7577.

MARY J. McGINNIS et al.
vs.
G., C. & S. F. RY. Co.

Special Charge No. 9.

The defendant requests the court to charge the jury:

Should you find for the plaintiff you should limit the amount you may assess as damages to such sum as if paid in cash, in hand at this time, would fairly and justly compensate plaintiff for the pecuniary loss you may find from the evidence (if any) that she has sustained as the direct and proximate result of the death of W. T. McGinnis, her husband.

And you cannot and must not consider as a basis for damages, or as any item therein, any loss of companionship, or mental anguish, or grief or suffering, she may have been occasioned by his said death.

TERRY, CAVIN & MILLS,
A. H. CULWELL,
JNO. M. FURMAN,
Att'ys for Def't.

Given to be considered by the jury in connection with the main charge.

JOHN D. ROBINSON,
Dist. Judge.

Filed June 7th, 1911. E. E. Upshaw, Clerk District Court, Bell County, Texas.

In the District Court of Bell Co., June Term, 1911.

No. 7577.

MARY J. McGINNIS et al.
vs.
GULF, COLORADO & SANTA FE RY. CO.

Special Charge No. 10.

You are charged that you cannot find any damages in favor of Nelta Saunders alleged to be a daughter of W. T. McGinnis, because the proof shows that she is a married woman and is supported by her husband X. B. Saunders, and there is no proof that she had any expectation of any pecuniary assistance from her said father, W. T. McGinnis, nor is there any allegation in the petition that she has any expectation of such assistance if her father had lived.

TERRY, CAVIN & MILLS,
A. H. CULWELL,
JNO. M. FURMAN,
Att'ys for Def't.

Refused:
JOHN D. ROBINSON,
Dist. Judge.

Filed June 7th, 1911. E. E. Upshaw, District Clerk, Bell County Texas.

(Record, Page 29.)

JUNE 5*th*, 1911.

No. 7577.

MARY J. McGINNIS
vs.
GULF, COLORADO & SANTA FE RAILWAY COMPANY.

This day this cause was called for trial and both parties announced ready, then came on to be heard the general and special exceptions of the defendant, which were by the court overruled, except No. 3 thereof, which was sustained, to which ruling of the court the defendant then and there excepted, and a jury, to-wit, Joe B. Ferguson, and eleven others were duly selected empaneled and sworn, who having heard the pleadings read, the evidence submitted, the argument of counsel in support thereof, and being duly charged by the court, retired to consider their verdict, and afterwards on the 8th day of June returned into court the following verdict, which was received by the court and is here now entered upon the minutes as follows: "We the jury find for Mrs. Mary J. McGinnis, administratrix the sum of Fifteen Thousand ($15,000) dollars as damages and we apportion the same as follows: "To Mrs. Mary J. McGinnis Seven

Thousand and five hundred $7500.00 dollars, Seven Thousand five hundred $7500.00 dollars to be equally divided among the four children.

JOE B. FERGUSON, *Foreman.*

It is therefore ordered, adjudged and decreed by the court that the plaintiff do have and recover of and from the defendant the sum of Fifteen Thousand $15,000.00 Dollars; that Seven thousand five hundred $7500.00 dollars of said amount be recovered for the use and benefit of Mrs. Mary J. McGinnis, and that the remaining Seven Thousand Five Hundred ($7500.00) Dollars be recovered for the use and benefit of the four children mentioned in plaintiff's petition filed herein, towit, the sum of Eighteen Hundred — ($1875) dollars for the use and benefit of each of said four children.

It is further ordered that the defendant pay all costs of this suit, and that this judgment bear interest from date thereof at the rate of six percent per annum; for all of which execution may issue.

* * * * * * *

(Record, Page 181.)

Proceedings in Court of Civil Appeals.

No. 4986.

GULF, COLORADO & SANTA FE RY. CO., Appellant,
vs.
MARY J. McGINNIS et al., Appellees.

Appeal from the District Court of Bell County.

Opinion.

W. T. McGinnis, a locomotive engineer, while in the discharge of his duty operating an engine drawing a south-bound fast passenger train out of Temple on the appellant's road on the night of October 6th, 1909, was fatally injured at Silenus on account of a derailment, and this suit was brought by Mrs. Mary J. McGinnis as administratrix of his estate, for the benefit of herself as surviving wife, and also for the benefit of his four children, three of whom were minors and one a married daughter, Mrs. Nelta Saunders, alleging that said derailment occurred on account of a defective switch, which appellant had negligently failed to inspect and warn deceased of.

Defendant answered by general demurrer, general denial and specially that at the time of the accident it was engaged in interstate commerce, and that the deceased, as its engineer, was likewise so engaged, which facts were plead in bar of plaintiff's right to recover, on the ground that said suit could not be maintained under the laws of this State. It likewise plead assumed risk, and further denied plaintiff's right to recover on the ground that it exercised rea-

sonable care to keep its road bed and switch in a reasonably safe condition, and had made frequent inspection of the same, and that this accident was not the result of negligence on its part; that the same occurred in the night when it was not usual or customary to inspect the track; that the track and switch were in good condition on the afternoon before the accident; that the same was occasioned because the switch had been misplaced by some evilly disposed person intent upon mischief.

A jury trial resulted in a verdict and judgment in behalf of plaintiff in the sum of $15,000, which was apportioned by the jury awarding to Mrs. McGinnis as surviving wife the sum of $7,500, and dividing the balance equally among said four children.

Briefly stated, the facts disclose that plaintiff's decedent was the engineer in charge of appellant's southbound passenger train out of Temple on the night of October 5th, 1909, which was derailed at Silenus about 2 o'clock on the morning of the 6th, the engine and tender being thrown from the track on account whereof he received serious injuries, from which he died. It seems that the train was making some sixty miles an hour at the time of the accident, and that the switch light was so set as to indicate a clear main line track, but the switch was partly open and its points worn and defective, on account of which, in railroad parlance, the engine "split the switch," causing the wreck. It further appeared that the pitman or bridle rod was disconnected with the switch stand, and that the lug which fastened or held the same was misplaced. In support of the contention that the switch had been tampered with, evidence was offered to the effect that about dusk on the evening before, a loud report or explosion was heard in the neighborhood of this switch, and that an inspection of the switch and switch-stand shortly after the accident showed discolorations, as though some explosive, such as dynamite, powder or nitroglycerine had been recently discharged thereon. There was no evidence, however, showing that the ground or earth had been disturbed in or about the switch and ties, or any holes torn in the earth, such as would likely have been made by dynamite or other like explosive. The lug spoken of was shown to have been picked up some 240 feet from the track.

Controverting this theory there was evidence on the part of plaintiff by persons who had also examined the switch and stand immediately after the accident, to the effect that there was no such discoloration as claimed by witnesses for defendant; and further that the pitman or bridle rod was bent, which indicated that *there* was occasioned by the force of the wreck, rather than the cause of it, and that it would not likely have been bent if it had been misplaced prior to the wreck. On the issue as to whether the defendant was guilty of negligence in not inspecting its track and apprising decedent of his danger, evidence was offered showing that about 5:30 o'clock of the afternoon of the day before the accident, that both a handcar and a freight train had passed over this switch in safety. It was also shown that it was not the custom of appellant nor of any other road in this state, to inspect its track or switches in the night time, unless on account of some sudden emergency, such as a storm, which fact was generally known to its employés. No affirmative

evidence was offered, however, showing that deceased knew of such custom; but if there had been any tampering with the switch, by explosion, as claimed, this must have occurred about 6 o'clock p. m. which was a period of some eight hours before the accident, during which time it was not shown that any effort had been made to inspect or look after this switch or track. It was further shown on the part of plaintiff by several persons who examined the switch that it was slightly open, estimated to be from three-fourths to half an inch, and that the switch points appeared to have been gradually worn off some ten or twelve inches back; that this wearing away seemed to be old, as evidenced by the rust thereon, and that such conditions would occasion a wreck, by causing the engine to "split" the switch. We have only undertaken to give the salient points of the evidence on the issues thus presented, there being a mass of it on all phases of the case.

It is conceded that this suit was brought under and by virtue of the Federal Employers' Liability Act of April 22nd, 1908, 35 Stat. 65 Chap. 149, which was amended April 5th, 1910, 36 Stat. 291, Ch. 143, which provides that suit to recover damages based thereon must be brought by the personal representative of the deceased for the use and benefit of the surviving wife and children of the deceased, or the other beneficiaries, in the absence of such next of kin; for which reason we think that there is no merit in appellant's contention to the effect that the statement in the petition that the suit was brought by Mrs. Mary McGinnis as administratrix of the estate of W. T. McGinnis, deceased, for the use and benefit of herself as surviving wife, &c., showed that it was brought in a dual capacity; nor do we think that the statements therein as to whose benefit it was brought were improper and should be stricken out, as contended by appellant, because we believe that under this statute such allegations were certainly proper, if not necessary.

Nor do we think the court erred in refusing to give appellant special charge urging that since the proof showed that Mrs. Nelta Saunders was a married woman, and failed to show that she had any expectation of pecuniary assistance from her father, that she was therefore not entitled to recover damages on account of his death; because said statute expressly authorized the suit to be brought by the personal representative for the benefit of the surviving wife and children of the deceased, irrespective of whether they were dependent upon him, or had the right to expect any pecuniary assistance from him.

By its 5th assignment, appellant asserts that the court erred in refusing to give the following special charge: "The jury is charged that if you believe that the accident was occasioned by the malicious interference with the switch stand by some evilly disposed person in the night time of the night on which the accident occurred, then your verdict should be for the defendant, unless you further find that the defendant knew of such interference, or knew such facts in regard thereto as would put a person of ordinary prudence on inquiry"; insisting by its proposition that the defendant was entitled to an affirmative charge presenting this defense. We think, in the absence of a charge upon this subject, that its refusal would

have been error; but the court in its main charge instructed the jury that "If you believe from the evidence that the switch at Silenus was displaced or injured in any manner by explosions or otherwise, by some person intent upon mischief, and that the same caused the accident that resulted in the death of W. T. McGinnis, and that defendant was not negligent in failing to discover the same, then you will find for the defendant." Besides this, the court gave the following special charges, covering this phase of the case: "Special charge No. 8: You are charged that the railway company is in no case the insurer of the safety of its employés; and if you find from the evidence that at the point of the accident the defendant company provided and maintained reasonably safe tracks and switches for the purpose of conducting its business in operating its freight and passenger trains, and that the accident was solely the result of an injury to the switch, caused by some evil minded person, and not through any want of ordinary care on the part of defendant, then if you so find, you will find for the defendant." Special charge No. 5: "You are charged that if you believe from the evidence that it was not unusual or customary to inspect the switches or track in the night time, and that there was no circumstance known to the defendant in the exercise of ordinary care to indicate that the switch and track at the place of the accident should have been inspected in the night time, then the defendant would not be guilty of negligence for its failure to so inspect." Special Charge No. 4: "If you believe that the deceased knew that it was not usual nor customary to have the switch-stand, switches and tracks inspected under normal circumstances in the night time, then you are charged that the deceased assumed all of the risks growing out of such failure to so inspect, and plaintiff cannot recover because of the failure of the railroad company to so inspect." It seems to us that these charges, together with the main charge, fully, clearly and fairly presented this feature of appellant's defense, for which reason the court properly refused to give the special charge requested.

The tenth assignment complains that the court erred in giving the 6th paragraph of its charge to the jury, which is as follows: "Now if you believe from the evidence that the plaintiff Mrs. Mary J. McGinnis, is the duly qualified administratrix of the estate of W. T. McGinnis, deceased, and was the wife of W. T. McGinnis at the date of his death, and that Lyle McGinnis, Laland McGinnis and Lamar McGinnis were their minor children, and that Nelta Saunders was their married daughter, and if you further believe from the evidence that on or about the 6th day of October, 1909, in Bell County, Texas, the said W. T. McGinnis was in the employment of the defendant as a railway engineer, and as such was engaged in running one of the defendant's locomotives in the operation of one of defendant's passenger trains, and that while so employed in running said passenger train over its line of railway he ran his engine and train into a defective switch at Silenus, thereby causing the accident in question, and which resulted in the death of W. T. McGinnis; and if you further believe from the evidence that the switch point at said place had worn away, broken off and became de-

fective, or, if you find from the evidence that said switch had become loose or open; and if you further find from the evidence that the defendant had failed to inspect its said switch and roadbed and had tion filed herein, towit, the sum of Eighteen Hundred ($1875) (if it was dangerous and defective at the place in question at the time above specified) and if you further find that the defendant was negligent in permitting its switch to be and remain in such defective condition (if you find it was in a defective condition) and if you further find that it failed to exercise ordinary care to inspect said switch and track, and if you find that such failure, if any, was negligence as that term has been heretofore defined, and if you further find that such negligence, if any, was the direct and proximate cause of the death of W. T. McGinnis, then you will find for the plaintiff and assess the damages as hereinafter directed, unless you should find for the defendant under other instructions given you in this charge."

By the first proposition thereunder it is insisted that the same imposed too great a burden upon the defendant, in that under said charge a verdict was warranted against it if the jury should find that the switch was loose or open, without regard to the cause thereof, claiming that since it was not an insurer, its only obligation was to exercise ordinary care to see that the same was in a reasonably safe condition. Second. Because there was no evidence to sustain or warrant the submission of the issue as to the failure of the defendant to inspect the track; and, third, that the mere fact that the switchpoint had become defective was not sufficient to render the defendant liable, because such defect, if any in and of itself was not negligence to deceased, and in order to make the same actionable, it was necessary to show that the defect had existed for such length of time as that the same should have been discovered or could have been discovered by reasonable inspection.

Appellee contends that this charge is not subject to the criticism offered: that the jury were not authorized to find a verdict against the defendant merely because the switch was defective, unless they further found that defendant failed to inspect and was guilty of neglignece; and that the same was the direct and proximate cause of the death of the deceased; contending that the evidence established that the switch had been defective for a long time, as was apparent from the condition of the switch points.

We think appellee is correct in this respect. The charge does not authorize a recovery on the ground that the jury should merely find that there was a defect, unless they further found that the defendant had failed to inspect and was guilty of negligence in so failing, and that this was the proximate cause of the injury. It is true that the burden of proof rested upon the appellees to show negligence, before they were entitled to recover; but in the instant case it will be recalled that the proof did show a derailment; and that the same was occasioned by a defective switch. This being true, it then devolved upon the defendant to show that it was not guilty of negligence in this respect. This could be done by showing that they had exercised ordinary care to inspect the switch, and keep the same in proper condition, but, notwithstanding this, some outsider

had so interfered with the same as to cause the accident. In the present case they sought to show that the track was tampered with. This issue was submitted to the jury under proper instructions; and the court likewise in the charge above outlined, permitted a recovery on the part of plaintiff, notwithstanding the switch had been tampered with, provided the jury believed from the evidence that there was a failure on the part of the defendant to exercise ordinary care to inspect the track and protect the plaintiff's decedent from danger. The mere fact that it was not customary on the part of defendant and other railways, to inspect their tracks at night, it seems to us *not* could not be regarded by the court sufficient, as matter of law, to discharge this burden; but the issue remained one of fact for the determination of the jury under appropriate instructions. In I. & G. N. R. R. Co. vs. Johnson, 55 S. W. 772, where a brakeman was killed by the derailment of a train at a defective switch near Austin, plaintiff alleged the failure to exercise proper care by inspection, for the discovery of the defect. The defendant in that case, as in this, claimed that the track and switch at the place of the accident had been tampered with, and that it had exercised due care, and therefore was not responsible. Mr. Chief Justice Key, then Associate Justice, delivering the opinion of the court, said: "While the burden of proving negligence on the part of appellant rested upon appellees, when it was developed by the testimony that the derailment and wreck which resulted in the death of Johnson were caused by an open switch, and that he himself was not at fault, these facts were sufficient to justify a finding of negligence against the appellant, unless it submitted testimony explaining how the switch came to be open, or at least showing that it had exercised proper care to keep the switch and track at that place in safe condition." Citing McCreary vs. Railway, 89 Tex., 168; Washington vs. Railway, 90 Tex., 31. Proceeding the court says: "But leaving out of the case the theory of the switch rod breaking on account of ordinary wear and tear, and conceding that the switch was interfered with and opened by some outside person, for whose conduct appellant was not responsible, still, it was liable if the testimony fails to show that it exercised proper care and diligence to discover the state of the switch and warn the freight train of the danger. The testimony fails to show any effort by appellant during the six hours intervening between the time Powers' engine passed the switch and the time of the wreck, to ascertain the condition of the switch and track at that point."

In the case of Texas Mexican Railway Co. vs. Mendez, 78 S. W., 25, the train came to a bridge about four o'clock in the morning of May 1st, 1902, and the bridge having been consumed by fire, and the fire having gone completely out, leaving the rails thereon without support, the train was precipitated and plaintiff injured. Plaintiff testified that it was the custom of the section gang to go over and examine their section in the day, but he never saw them do so at night, and did not know whether they did so at night. A train had passed safely over the track the afternoon before. The court said: "As other known conditions, to some extent, existed, in which a fire could originate, the courts cannot arbitrarily say with

what frequency inspections ought to have been carried on in order to constitute ordinary care. It is unquestionably of the greatest importance for a railway company to be careful in protecting its employés as well as its passengers through inspection of its road. It will not do, as a matter of law, to say that it may send an inspector over its section, and then abstain from giving it any attention whatever for a considerable time, simply because no necessity is apparent for it. We apprehend that the origen of defect might be so recent and the circumstances such that the court could say that the company had not been negligent in not discovering it in time to prevent the particular accident. But as we have no statute prescribing the railway company's duty as to the frequency of inspection, the question is generally and necessarily one for the jury to determine."

In Thompson vs. G. H. & S. A. Ry. Co., 106 S. W., 912, it is said: "How often inspections of the railroad track must be made depends upon its location, the surrounding country, the character of population, and other circumstances; and, in view of the diversified facts surrounding each case, the sufficiency of such inspection is peculiarly a question of fact for the jury. This rule would not be changed by the fact that the defect in the track was caused by criminals, because the same duty to discover defects would prevail in that case as in the case of defects from any other cause. The duty to exercise at least ordinary care in detecting the defect in the track devolved upon the appellee, regardless of what may have caused the defect; and the question of whether appellee exercised such care was one of fact for the jury. We do not know when the displacement of the rail that derailed the engine took place, only that it occurred sometime prior to the death of Thompson; and it was not for the trial judge to determine that the inspection and watch over the track was sufficient, even though the time of the displacement had been shown, unless it had been such a short interval between the displacement and the accident as to preclude the idea that it could have been discovered by appellee. When it is proved that Thompson was killed through the derailment of his engine by reason of the defect in the track of appellee's railway, appellants had made out a prima facie case of negligence on the part of appellee, and the burden rested upon it to show that the defect in the track had been caused by the unlawful acts of trespassers, and that it had not been negligent in failing to discover the same. Appellee, and not appellants, should have established the fact of such careful inspection as the place and circumstances demanded, and a failure to fix a time proximately when the trespassers did their work is chargeable to appellee, and not appellant. The rule is thus stated in the case of Marcom vs. Railway, 126 N. C. 200, 35 S. E. 423, by the supreme court of North Carolina, in a suit for damages for the death of a fireman, which occurred through a derailment: "It is the duty of every railroad company to provide and maintain a safe roadbed, and its negligent failure to do so is negligence per se. That while the company is held to a very high degree of care, there must in all cases be some element of negligence to justify a recovery, and it cannot be held responsible for the wanton and malicious acts of an outsider, unless it could, by the exercise of reasonable diligence have

prevented the consequences of such act. As the law places upon the company the positive duty of providing a safe track, including the incidental duties of inspection and repair, its unsafe condition, whether admitted or proved, of itself raises the presumption of negligence. This is always the case where there is a positive duty imposed by law. The burden of proving such a failure of duty rests upon the plaintiff, but when that fact is proved or admitted, the burden of proving all such facts as are relied upon by the defendant to excuse this failure, rests upon the defendant. Its contention that the accident was caused by some one for whom it was not responsible, and the consequences of whose act it could not have prevented by any reasonable degree of care was an affirmative defense by its very nature carrying with it the burden of proof." Citing in support of the doctrine Railway Co. vs. Gaither, 43 S. W., 266; Williams vs. Lumber Company, 114 La., 805, 38 So., 567; Ry. Co. vs. Kane, 92 Ga., 187, 18 S. E., 18, 22 L. R. A., 315; See also Ry. Co. vs. Brandt, 122 S. W., 59; Ry. Co. vs. Sandlin, 122 S. W., 62.

The 12th assignment complains that the court erred in failing to give appellant's special charge defining ordinary care. This charge, we think, was properly refused, (1) because the court had given a correct charge upon the subject; and (2) because the charge was argumentative and upon the weight of evidence.

The remaining assignments, in various respects, assail the evidence as being insufficient to sustain the verdict. We have carefully considered the entire record, in connection with these several assignments; and while there is some evidence tending to show that the switch had been interfered with, and that some care had been exercised for the protection of the track, still, as there was a conflict in the evidence as to both of these issues, we are not inclined to disturb the judgment on this ground, since under appropriate instructions the jury have passed upon these issues; and the trial court, who was in better position than we are to determine the truth or falsity of the evidence to sustain or defeat the respective contentions, has declined to interfere therewith.

Finding no error in the proceedings of the trial court which will justify us in setting aside its judgment, the same is in all things affirmed.

Affirmed.

B. H. RICE,
Associate Justice.

Filed April 24th, 1912.

(Endorsed:) With App. No. 7828. No. 4986. G. C. & S. F. Ry. Co., Appellant, vs. Mary J. McGinnis et al., Appellees. Appeal from Bell County. Opinion. Affirmed. Filed in Court of Civil Appeals, Third Supreme Judicial District, Austin, Texas. Apr. 24, 1912. R. H. Connerly, Clerk.

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(Record, page 298.)

Judgment of Supreme Court of Texas.

In Supreme Court of Texas, from Bell County, Third District, June 26th, 1912.

G., C. & S. F. Ry. Co.
vs.
MARY J. MCGINNIS et al.

This day came on to be heard the application of G. C. & S. F. Ry. Co., for a writ of error to the Court of Civil Appeals for the Third District, and the same having been duly considered, it is ordered that said application be refused. That the applicant, Gulf, Colorado & Santa Fe Railway Company, and its sureties, H. O. Stein and Geo. Sealy, pay all costs incurred on this application.

I, F. T. Connerly, Clerk of the Supreme Court of Texas, hereby certify that the above is a true and correct copy of the judgment rendered by the Supreme Court on the application for writ of error in the above styled cause.

Witness my hand and the seal of said court, this the 1st day of July, A. D. 1912.

[SEAL.] F. T. CONNERLY, *Clerk*.
By J. S. MYRICK, *Deputy*.

(Endorsed:) Application No. 7828; G. C. & S. F. Ry. Co., vs. Mary J. McGinnis, Adm'r et al. Copy of judgment in Supreme Court. Application for writ of error refused. Filed in Court of Civil Appeals, Third Supreme Judicial District, Austin, Texas, July 1st, 1912. R. H. Connerly, Clerk.

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(Record, page 301.)

GULF, COLORADO AND SANTA FE RAILWAY COMPANY, Plaintiff in Error,
vs.
MARY J. MCGINNIS, Administratrix, Defendant in Error.

Petition for Allowance of Writ of Error.

To the Honorable the Supreme Court of the United States:

Comes the Gulf, Colorado and Santa Fe Railway Company by its Attorneys, J. W. Terry, A. B. Browne and A. H. Culwell, and complains that in the records and proceedings and also in the rendition of a judgment in a suit between the Gulf, Colorado and Santa Fe Railway Company, Appellant, and Mary J. McGinnis, Administratrix, Appellee, in the said Court of Civil Appeals for the Third

Supreme Judicial District of Texas, being the highest Court of law or equity in said State in which a decision was rendered in said suit, the Supreme Court of Texas having denied to said Appellant its application for a writ of error presented therein and the said Court of Civil Appeals for the Third Supreme Judicial District of Texas being the Court which had the final custody of the record in said cause, and in which a final judgment was rendered against the said Appellant on the 24th day of April, 1912, and in which Plaintiff in Error's motion for a rehearing was overruled by said Court on the 15th day of May, 1912, wherein there was drawn in question the validity of a statute of the State of Texas under the facts of this case on the ground of its being repugnant to the laws of the United States on the same question and the decision was in favor of such, the validity of said statute, as same applied to the facts of this case. the same being known as Chapter 163, 29th Legislature of the State of Texas and being "An Act to prescribe when the defense of assumed risk shall and shall not be available when interposed by a person, corporation or receiver operating a railroad or street railway in any suit for damages for the death or personal injury of an employee, and declaring an emergency," said Act, Approved April 24th, 1905, in conjunction with the further act of the Legislature of the State of Texas, same being Chapter 10, First Called Session of the 31st Legislature, and being "An Act declaring corporations, receivers, or other persons operating railroads in this State, to be liable to employés for injuries received through the negligence of such employer, officer, agent or servant, or in case of death from such injury, to be liable to the surviving widow and children, or husband and children and mother and father of the deceased; and if none, then of the next of kin dependent upon such employés; prescribing the effect of contributory negligence and assumed risk upon the right of recovery; declaring void any contract, rule or regulation intended to enable the employer to limit liability; also providing that employer shall be entitled to set off against any claim any sum contributed by such employee to a fund provided for such cases and which was actually paid to the injured party, and exempting such recovery from the debts of the deceased, and providing that the recovery shall be apportioned by the jury, or court trying the case without a jury, among those entitled to recover; providing how and by whom suit may be brought, also that nothing in this Act shall impair any right under any other law of this State or of the United States or in any way interfere with any proceeding now pending in any court, and declaring an emergency," and wherein is drawn in question a right, privilege and immunity claimed under a statute of the United States, same being "An Act relating to the liability of common carriers by railroad to their employés in certain case," approved April 22nd, 1908, and being 35 Stat., 65 Ch. 149, Laws of the United States and the decision of the court of Civil Appeals is and was against the right and privilege especially set up and claimed by Plaintiff in Error herein, it appearing without controversy that at the time of the accident out of which this suit arose deceased was killed while he was employed by Plaintiff in error engaging in commerce between the State of Texas and other states of the United States, and

that deceased was an employee handling such interstate commerce at the time of his death, and it being claimed by said Plaintiff in Error that under the Act of Congress above and under the facts of this case the deceased, W. T. McGinnis, assumed the risk of the injuries which resulted in his death, and that under the Act of Congress, as above set up, the Defendant in Error herein has no cause of action against your petitioner, and that under the facts of this case in no event was the married daughter of the deceased entitled to recovery, and its exemption from liability under the terms of the Act of Congress, above mentioned, having been fully set up in the said Court of Civil Appeals and the said Court of Civil Appeals having denied to it the exemption from liability under said Act, as herein asserted, and your petitioner alleging, as it does, that the cause of action, if any, existing in favor of the Defendant in Error, is one arising alone and exclusively under and by virtue of an act of Congress, which act of Congress is the one above specified, all of which appears from the record and proceedings in the said suit; manifest error hath happened to the great damage of the Gulf, Colorado and Santa Fe Railway Company;

Wherefore, the said Gulf, Colorado and Santa Fe Railway Company, by its Attorneys prays for the allowance of writ of error and such other process as may cause the same to be corrected by the Supreme Court of the United States.

J. W. TERRY,
A. B. BROWNE,
A. H. CULWELL,
Attorneys for Gulf, Colorado and Santa Fe Railway Company, Plaintiff in Error.

Allowed by:
JOSEPH R. LAMAR,
Associate Justice of the Supreme Court of the United States.

Endorsed: Gulf, Colorado and Santa Fe Ry. Co., Plaintiff in Error, vs. Mary J. McGinnis, Adm'x, Defendant in Error. Filed in Court of Civil Appeals 3rd Supreme Judicial District, Austin, Texas, Aug. 14, 1912. R. H. Connerly, Clerk.

(Record, page 304.)

In the Court of Civil Appeals for the Third Supreme Judicial District of Texas.

GULF, COLORADO AND SANTA FE RAILWAY COMPANY, Plaintiff in Error,
vs.
MARY J. MCGINNIS, Administratrix, Defendant in Error.

In Error from the Court of Civil Appeals of the Third Supreme Judicial District of Texas.

To the Supreme Court of the United States:

Now comes the Gulf, Colorado and Santa Fe Railway Company, Plaintiff in Error, by its Attorneys, J. W. Terry, A. B. Browne and

A. H. Culwell, and says that in the record and proceedings aforesaid there is manifest error in the judgment and decision of the Court of Civil Appeals of the Third Supreme Judicial District of the State of Texas, to-wit:

First.

The Court of Civil Appeals of the Third Supreme Judicial District of the State of Texas erred in holding that the Plaintiff in Error herein was liable in damages for the death of W. T. McGinnis, and in failing to hold that the deceased assumed the risk of the injuries received by him, and of the danger thereof, under the Federal Employers' Liability Act, same being the act approved April 22, 1908, 35 Stat., 65, Ch. 149, as applied to the facts of this case.

Second.

The Court of Civil Appeals of the Third Supreme Judicial District of Texas erred in overruling and failing to sustain the Twenty-first assignment of error presented in that Court, said assignment complaining as it did of the failure of the trial court to grant it a new trial, and being as follows:

"The Court erred in failing and refusing to set aside the verdict returned herein, and in failing to give the defendant a new trial on the fifteenth ground of its amended motion therefor, which was as follows:

" 'The evidence shows without conflict that it was not usual or customary under normal conditions to inspect the track, switches and switch-stands in the night time; that the conditions at the time of this wreck were normal; that the switch in question was located on straight track, on level ground, in a clear country; that there had been no rainfall for some time previous to the accident which made it necessary or proper to keep track walkers doing service in the night time; that there were no usual circumstances in being, which rendered it expedient for the defendant to have the switches and switch-stand inspected in the night time; that it was well known and well understood by all operatives of trains, including the deceased, that under normal conditions, the track, switches and switch-points were not and would not be inspected in the night time; that the deceased knew on the night in question, or it is fair to assume that he knew that the switch and switch-stand at the point in question had not been inspected later than 6 o'clock on the afternoon before. Under this state of the evidence, the deceased clearly assumed all risks growing out of the failure to inspect the track, switches and switch-stand during that night.

" 'It was one of the ordinary risks of the service, well known by all engineers, and for each and all of these reasons the verdict of the jury is against the manifest weight and great preponderance of the testimony.' "

Third.

It having been admitted that this suit was maintained under the Federal Employers' Liability Act, and that the rights and liability of the parties are to be determined by that act, the Court of Civil

Appeals of the Third Supreme Judicial District of Texas erred in holding that the Plaintiff in Error was liable for its failure to inspect its track and switches at night (which failure was the only theory upon which, under the evidence, the Court of Civil Appeals could have affirmed the judgment herein), and that the deceased did not assume the risk growing out of the failure of the Plaintiff in Error to inspect its track and switches in the night time. The assumed Risk Statute of Texas, known as Ch. 163, 29th Legislature of the State of Texas, approved April 4, 1905, is wholly inapplicable, as under the Federal Employers' Liability Act, as applied to the facts of this case, the deceased did assume all risk growing out of the failure of the Railway Company to inspect its track and switches in the night time.

Fourth.

The Court of Civil Appeals of the Third Supreme Judicial District of Texas erred in holding that the trial court committed no error in failing and refusing to give to the jury Plaintiff in Error's Special Charge No. 10, which was as follows:

"You are charged that you cannot find any damages in favor of Nelta Saunders, alleged to be a daughter of W. T. McGinnis, because the proof shows that she is a married woman, and is supported by her husband, X. B. Saunders, and there is no proof that she had any expectation of any pecuniary assistance from her said father, W. T. McGinnis, nor is there any allegation in the petition that she had any expectation of such assistance if her father had lived."

Fifth.

The Court of Civil Appeals of the Third Supreme Judicial District of Texas erred in holding that the trial Court committed no error in failing and refusing to set aside the verdict returned on the ninth ground of the amended motion for a new trial, which was as follows:

"In no event should a verdict have been returned in favor of Nelta Saunders. The evidence showed that she was a married woman, who was supported by her husband, and there was no evidence showing, or tending to show, that she received any contributions from her father, or that she would likely receive such contributions in the future. Judgment, therefore, awarding her damages was without evidence to sustain it, and same should be set aside," and said Court of Civil Appeals erred in holding that under the Federal Employers' Act plaintiff in Error would be and is liable in damages to the married daughter of the deceased whether such daughter received contributions from the deceased, or had expectation in the future of so doing, or not.

Respectfully submitted. J. W. TERRY,
A. B. BROWNE,
A. H. CULWELL.
Attorneys for Plaintiff in Error, Gulf, Colorado and Santa Fe Railway Company.

Endorsed: Gulf, Colorado and Santa Fe Ry. Co., Pl'ff in Error, vs. Mary J. McGinnis, Adm'x, Def't in Error. Assignments of Error. Filed in Court of Civil Appeals 3rd Supreme Judicial District, Austin, Texas, Aug. 14, 1912. R. H. Connerly, Clerk.

(Record, page 308.)

GULF, COLORADO AND SANTA FE RAILWAY COMPANY, Plaintiff in Error,

vs.

MARY J. McGINNIS, Administratrix, Defendant in Error.

Know all men by these presents, That, we, the Gulf, Colorado and Santa Fe Railway Company, as principal, and Geo. Sealy and Sealy and Hutchings, as sureties, are held and firmly bound unto Mary J. McGinnis, Administratrix, in the full and just sum of Fifteen Thousand Dollars ($15,000.00) to be paid to the said Mary J. McGinnis, Administratrix, to which payment well and truly to be made we bind ourselves, our heirs, executors, administrators and successors jointly and severally by these presents.

Sealed with our seals and dated this 29th day of July, 1912.

Whereas, lately at a term of the Court of Civil Appeals of the Third Supreme Judicial District of the State of Texas in a suit pending in said Court between the Gulf, Colorado, and Santa Fe Railway Company, Appellant, and Mary J. McGinnis, Administratrix, appellee, a judgment was rendered against the Gulf, Colorado and Santa Fe Railway Company and in favor of the said Mary J. McGinnis, Administratrix, in cause number 4986 on the docket of said Court of Civil Appeals of the Third Supreme Judicial District, by which judgment the judgment of the District Court of Bell County, State of Texas, was affirmed and in which cause the Supreme Court of the State of Texas has denied to the said Gulf, Colorado and Santa Fe Railway Company its petition for a writ of error, and the said Gulf, Colorado and Santa Fe Railway Company having obtained a writ of error, filed a copy thereof in the Clerk's office of the said Court to reverse the judgment in the aforesaid suit, and citation directed to the said Mary J. McGinnis, Administratrix, citing and admonishing said Mary J. McGinnis, Administratrix, to be and appear at a Supreme Court of the United States to be holden at Washington within Thirty (#0) days from the date hereof; now the condition of the above obligation is such that if the Gulf, Colorado and Santa Fe Railway Company shall prosecute said writ of error to effect and answer all damages and costs, if it fail to make its plea good, then the above obligation to be void, else to remain in full force and virtue.

Sealed and delivered in the presence of

[SEAL.] GULF, COLORADO AND SANTA FE RAILWAY COMPANY,
By TERRY, CAVIN AND MILLS,
Its Solicitors.

GEO. SEALY.
SEALY HUTCHINGS.

Attest:
A. D. TORBERT,
Secretary Gulf, Colorado and Santa Fe Railway Company.

July —, 1912.

Approved by:
J. R. LAMAR,
Associate Justice Supreme Court
of the United States.

Writ to operate as a supersedeas.

J. R. LAMAR,
Associate Justice S. C. U. S.

I, Geo. Sealy, do swear that I am worth in my own right at least the sum of Fifteen Thousand Dollars ($15,000.00) after deducting from my property all that which is exempted by the Constitution and Laws of the State from forced sale, and after the payment of all my debts of every description, whether individual or security debts, and after satisfying all encumbrances on my property which are known to me; that I reside in Galveston County, State of Texas, and have property in said State liable to execution worth more than Fifteen Thousand Dollars ($15,000,00).

GEO. SEALY.

Sworn to and subscribed before me this 29th day of July, A. D. 1912.

[SEAL.] CHAS. T. PECK,
Notary Public in and for Galveston County, Texas.

I, Sealy Hutchings, do swear that I am worth in my own right at least the sum of Fifteen Thousand Dollars ($15,000) after deducting from my property all that which is exempted by the Constitution and Laws of the State from forced sale, and after the payment of all my debts of every description, whether indivi-*aul* or security debts, and after satisfying all en*b*umbrances on my property which are known to me; that I reside in Galveston County, State of Texas, and have property in said State liable to execution worth more than Fifteen Thousand Dollars ($15,000.00).

SEALY HUTCHINGS.

Sworn to and subscribed before me this 29th day of July, A. D. 1912.

[SEAL.] CHAS. T. PECK,
Notary Public in and for Galveston County, Texas.

Endorsed: Gulf, Colorado and Santa Fe Ry. Co., Pl'ff in Error, vs. Mary J. McGinnis, Adm'x, Def't in Error. Writ of Error Bond. Filed in Court of Civil Appeals 3rd Supreme Judicial District, Austin, Texas, Aug. 14, 1912. R. H. Connerly, Clerk.

(Record, Page 312.)

Bill of Costs in Court of Civil Appeals.

Filing Record	.50
Docketing Cause	.50
Appearances	1.00
Filing and entering motion	.35
Orders	2.00
Filing 22 extra papers	2.20
Judgment	1.00
Taxing costs	.50
Mandate	1.50
Recording opinion	7.20
Certified copy bill of costs	.75
Certified copy orders to the Supreme Court	2.00
Notices (15)	7.50
Copy of motion	5.70
Issuing precept	1.00
Sheriff's fee	1.00
Supreme Court costs	7.00
Transcript to Sup. Court U. S.	162.60
Certificate	.50
Expressage of transcript to Washington, D. C., prepaid	1.15
12 extra pages added to transcript	6.00
	$211.95

(Record, Page 313.)

Additional Certificate.

I, R. H. Connerly, Clerk of the Court of Civil Appeals of the Third Supreme Judicial District of Texas do hereby certify that the 12 pages immediately foregoing this certificate contain true and correct copies of the Petition to the Supreme Court of the United States for allowance of writ of error; Assignments of error in said Supreme Court of the United States and the bond for writ of error therein, together with a copy of the bill of costs in the Court of Civil Appeals of the Third Supreme Judicial District of Texas, and that the original writ of error and citation in error, from the Supreme Court of the United States of America are attached hereto immediately after this certificate, as the same appear of record from the files of my office in the case in said Court entitled—No. 4986, Gulf, Colorado & Santa Fe Railway Company, Appellant, vs. Mrs. Mary J. McGinnis et al., Appellees. Appeal from Bell County.

Witness my hand and the seal of said court this the 15th day of August, A. D. 1912.

[Seal of the Court of Civil Appeals of the State of Texas.]

R. H. CONNERLY,
Clerk of the Court of Civil Appeals of the Third Supreme Judicial District of Texas.

(Record, Page 314.)

GULF, COLORADO AND SANTA FE RAILWAY COMPANY, Plaintiff in Error,

vs.

MARY J. McGINNIS, Administratrix, Defendant in Error.

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

President of the United States to the Honorable the Judges of the Court of Civil Appeals of the Third Supreme Judicial District of Texas at Austin, Texas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Civil Appeals of the Third Supreme Judicial District of Texas before you, or some of you, being the highest Court of law or equity of the said State in which a decision could be had in said suit between the Gulf, Colorado and Santa Fe Railway Company, Appellant, and Mary J. McGinnis, Administratrix, Appellee, being numbered 4986 on the docket of the said Court of Civil Appeals of the Third Supreme Judicial District of Texas, wherein was drawn in question a right, privilege and immunity claimed under a statute of the United States and the decision was against such, the right, privilege and immunity so claimed, and wherein was drawn in question the validity of a statute of or an authority exercised under said State on the ground of their being repugnant to the Constitution and Laws of the United States and the decision was in favor of such their validity, and wherein was drawn in question the construction of a statute of the United States and the decision was against the right, privilege or exemption especially set up or claimed under such statute; and manifest error hath happened to the great damage of the said Gulf, Colorado and Santa Fe Railway Company as by this complaint appears, we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal distinctly and openly you send the record and proceedings aforesaid with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within Thirty (30) days from the date hereof in the said Supreme Court, to be then and there held that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 8th day of August, in the Year of Our Lord One Thousand Nine Hundred and Twelve.

[Seal of the Supreme Court of the United States.]

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

To operate as a supersedeas on furnishing bond for Fifteen Thousand Dollars ($15,000.00).

Allowed by:

JOSEPH R. LAMAR,
Associate Justice Supreme Court of the United States.

Endorsed: Gulf, Colorado & Santa Fe Ry. Co. Pl'ff in Error, vs. Mary J. McGinnis, Adm'r, Def't in Error. Writ of Error. Filed in Court of Civil Appeals, 3d Supreme Judicial District, Austin, Texas, Aug. 14, 1912. R. H. Connerly, Clerk.

(Record, Page 317.)

GULF, COLORADO AND SANTA FE RAILWAY COMPANY, Plaintiff in Error,
vs.
MARY J. MCGINNIS, Administratrix, Defendant in Error.

Citation in Error.

The President of the United States to Mary J. McGinnis, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States to be holden at Washington within Thirty (30) days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the Court of Civil Appeals of the Third Supreme Judicial District of Texas at Austin, Texas, wherein the Gulf, Colorado and Santa Fe Railway Company is Plaintiff in Error and you are Defendant in Error, said cause being numbered 4986 on the docket of the said Court of Civil Appeals of the Third Supreme Judicial District of Texas, to show cause, if any there be, why the judgment rendered against said Plaintiff in Error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Joseph R. Lamar, Associate Justice of the Supreme Court of the United States, this the 26th day of July, in the Year of our Lord One Thousand Nine Hundred and Twelve.

JOSEPH R. LAMAR,
Associate Justice of the Supreme Court of the United States.

On this 13th day of August in the Year of Our Lord, One Thousand Nine Hundred and Twelve personally appeared J. B. Blair, Sheriff of Bell County, Texas, before me, a Notary Public in and for Bell County, Texas and makes oath that he delivered a true copy of the within citation to Hon. A. L. Curtis, who is the Attorney of Record of the within named Mary J. McGinnis, Administratrix, defendant in error.

J. B. BLAIR,
Sheriff of Bell County, Texas.

Sworn to and subscribed before me this 13th day of August, in the Year of our Lord Nineteen Hundred and Twelve, by the said J. B. Blair, affiant.

[SEAL.] N. P. WOODWARD,
Notary Public in and for Bell County, Texas.

Endorsed: Gulf, Colorado and Santa Fe Ry. Co., Pl'ff in Error, vs. Mary J. McGinnis, Adm'r, Def. in Error. Citation in Error. Filed in Court of Civil Appeals 3rd Supreme Judicial District, Austin, Texas, Aug. 14, 1912. R. H. Connerly, Clerk.

FILED.
DEC 31 1912
JAMES H. McKENNEY,
CLERK.

No. 762

IN THE

Supreme Court of United States

OCTOBER TERM, 1912

GULF, COLORADO AND SANTA FE RAILWAY COMPANY,

Plaintiff in Error,

vs.

MARY J. McGINNIS, ADMINISTRATRIX OF THE ESTATE OF W. T. McGINNIS, DECEASED.

BRIEF FOR PLAINTIFF IN ERROR.

J. W. TERRY,
GARDINER LATHROP,
A. B. BROWNE,
A. H. CULWELL,
Attorneys for Plaintiff in Error, Gulf, Colorado & Santa Fe Railway Company.

J. W. TERRY,
A. H. CULWELL,
Of Counsel.

CLARKE & COURTS, GALVESTON 07490

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No. 762.

IN THE

Supreme Court of United States

OCTOBER TERM, 1912.

GULF, COLORADO & SANTA FE RAILWAY COMPANY,

Plaintiff in Error,

vs.

MARY. J. McGINNIS, ADMINISTRATRIX OF THE ESTATE OF W. T. McGINNIS, DECEASED.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

We have heretofore filed a brief on the questions raised by the motion to dismiss or affirm and as cause has been assigned to the summary docket, we deem it necessary to present our views on the merits of the case.

This suit was instituted by Mary J. McGinnis, administratrix of the estate of W. T. McGinnis, deceased, June 23rd, 1910, in the District Court of Bell County, Texas, for damages for death of W. T. McGinnis, who was killed while in the service of plaintiff in error as a locomotive engineer, it being alleged that deceased

left surviving him said Mary J. McGinnis, his wife, and Lyle McGinnis, Lamar McGinnis, Laland McGinnis and Mrs. Nelta Saunders, his children. Verdict and judgment was returned June 5th, 1911, whereby was awarded to Mrs. Mary J. McGinnis $7500.00 and $7500.00 divided equally among the four children. (Rec., p. 22.) An appeal was taken to the Court of Civil Appeals of the State of Texas for the Third Supreme Judicial District, where, by written opinion filed April 24th, 1912 (Rec., p. 20), the judgment was affirmed. A motion for rehearing made by the plaintiff in error was overruled (Rec., p. 138.) The plaintiff in error's petition for a writ of error, addressed to the Supreme Court of the State of Texas, was refused on June 26th, 1912, and on July 26th, 1912, a writ of error was allowed by Mr. Justice Lamar.

The defendant in error, by her amended petition presented in the District Court of Bell County, charged that while the deceased, her husband, was engaged in operating an engine drawing a passenger train on or about the sixth day of October, 1909, and while performing his usual duties as such engineer, the said engine and train was derailed, when he received injuries which resulted in his death. She charged that the defendant negligently failed to provide a safe track and roadbed for the train to run over, and negligently failed to provide a safe engine upon which the deceased was engaged in the performance of his duties, and that the defendant negligently permitted the switch located at the point of accident to remain open and the rails to become out of alignment, permitted the switch point to be worn away, broken off and defec-

tive, which negligence permitted the wheels of the engine to leave the track, and the defendant had negligently failed to discover the condition of the switch and track and to repair and remedy the same, and failed to provide any warning to said W. T. McGinnis of the dangerous condition of the track and switch (Rec., pp. 7 to 9.) To this pleading the defendant interposed its answer, which consisted of general and special exceptions, a general denial and a special plea to the effect that the defendant railway Company at the time of this accident was engaged as a common carrier by railroad in commerce between various states of the Union, and that the train of which the deceased was engineer was handling commerce which had originated beyond the limits of the State of Texas; that it was a through passenger train and was hauling cars which had come over points beyond the limits of the State of Texas in a continuous journey; that it was handling United States mail which had originated at points beyond the limits of the State of Texas, and likewise baggage and express, and that the deceased was employed at the time of the accident by defendant in interstate commerce; that the defendant company was an interstate carrier, and that deceased was employed as a locomotive engineer, engaged at the time in the handling and carrying of interstate commerce; that plaintiff's cause of action, if any, arose solely and alone under the laws of the United States, and, to-wit, the Federal Employer's Liability Act, and same did not arise under any law of the State of Texas and could not be so controlled, and that under the laws of the United

States, deceased assumed the risk of the dangers encountered by him at the time and place of accident; that it had exercised ordinary care to provide and furnish a railroad track and roadbed that was reasonably safe, because frequent and careful inspections were made of the track and switch at the place of accident, and that such inspections, which were made by competent employees, had failed to discover any defects in the track or switch, and that there were no defects therein which could have been ascertained under exercise of the care required of this defendant; that this accident occurred in the night time, and that it was not customary, usual or necessary that inspectors be maintained to inspect railroad track and switches during the night time, or to have track walkers in the night time, all of which was well known to deceased, who knew that no inspection of this track and the switches would be made in the night time, that the railroad switch at the point of accident had been misplaced, so as to wreck a train going in the direction this train was going by some designing person intent upon mischief, and that the condition of the switch at the time of the accident was occasioned by the wilful act of a vicious, evil-minded, designing person, which was unknown to the defendant or any of its employees, and that it was not in possession of any facts putting it upon notice that such an act would or might be committed, and that for all of the above facts defendant was not liable herein, and that the deceased assumed the risk of the failure of the defendant to inspect its track and switches in the night time. (Rec., pp. 9 to 12.) On the trial of this case,

it was agreed that train No. 17, which was the one that the deceased was operating as an engineer at the time of his death, contained cars, passengers, baggage, express and mail that had originated at points outside of the State of Texas, and that were destined to points within and beyond the State of Texas, and also that it contained passengers and express that had originated at points within the State of Texas and destined to points within the State of Texas; that some of the cars in the train had originated at Kansas City, Missouri, destined for Galveston, Texas, some of them had originated at St. Louis destined for Galveston, Texas, some of them had originated at Cleburne, Texas, destined to Galveston, and that the deceased took the engine at Cleburne and was to have been released at Bellville, within the State of Texas. (Rec., p. 57.) At the conclusion of the evidence, the defendant requested the Court to direct the jury to return a verdict for the defendant, which request was refused (Rec., p. 16), and likewise requested charge that in no event should the jury find any damages in favor of Nelta Saunders, because the proof showed that she was a married woman, supported by her husband, and there was no proof that she had any expectation of pecuniary assistance from her father. This charge was also refused. (Rec., p. 21.) Defendant's amended motion for a new trial challenged the verdict and judgment for many reasons, and by the thirteenth, fourteenth, fifteenth, sixteenth and seventeenth sections thereof the verdict and judgment was specially challenged on the ground that there was no liability herein as against the defendant for the reason

that no negligence was shown as against the defendant company, as all the facts indicated that the deceased assumed all the risks of the dangers encountered at the time of the accident which occasioned his death (Rec., pp. 25 to 26), and by the ninth paragraph of said motion, the verdict in favor of Nelta Saunders was challenged for the reasons which were set up in the special charge which had been refused. (Rec., p. 24.)

The Court of Civil Appeals in deciding this case, admitted and assumed that the cause of action arose under and should be determined by the provisions of the Federal Employer's Liability Act of April 22nd, 1908. (Rec., p. 122.)

The accident happened at about two o'clock in the morning, and on the trial considerable evidence was offered on the issue as to what occasioned the derailment in question, the defendant contending and having evidence to sustain the theory that the switch had been cocked, or partly opened, which was accomplished by the use of some great force or power applied to the switch stand. We refer in this connection to the testimony of each of the witnesses appearing for the defendant and beginning at Record page 58 and ending at page 116. No evidence was offered on behalf of the plaintiff on the trial as to the cause of the accident, she contenting herself with the showing that there was a derailment and the condition of the switch and track AFTER THE ACCIDENT, from which the assumption was indulged that the switch was defective, and that the accident resulted from the defect. The evidence showed that the last train going

in the same direction as the one derailed passed over the switch in question shortly before six o'clock p. m., that this train passed in safety and that if the switch had been partly open at that time the train would have been derailed. (Rec., pp. 68 and 70.) It also appeared that section crews went to work at 7 a. m. and quit at 6 p. m. (Rec., p. 90), and it was the testimony of a number of witnesses that it was not usual and customary for railroads in this country to maintain track walkers or inspectors along the track in the night time, and that this was generally known and understood by all train operatives. See following testimony: Tom Ormand (Rec., p. 70), W. L. Alexander (Rec., p. 87), W. E. Maxson (Rec., p. 95), R. Robinson (Rec., p. 97), W. M. Stacy (Rec., p. 108), W. L. Foreman (Rec., p. 110), O. R. Sherrar (Rec., p. 113), M. G. Flew (Rec., p. 113), and K. S. Hull (Rec., p. 115.) It appeared that the deceased was an old employee, familiar with the line and the rules of the service, and had been employed as an engineer for more than twenty years. The following rules of the railway company were offered in evidence, and were admitted as in effect at the time of the accident:

"Rule 586. Unless relieved therefrom, the roadmaster, section foreman, or one or more of their reliable men, must pass over their entire section every day, Sundays included, and see that the track is in safe condition. They will especially look at all culverts, cattle-guards and banks, and see and know that each is in safe condition for the movement of trains." (Rec., p. 107.)

"Rule 592. During heavy storms of rain or snow,

section foremen will at once go over their track to ascertain if the track is safe, and points most likely to be damaged must be given attention so that they may be cleared of ice and snow." (Rec., p. 107.)

It appeared that the track of the defendant at the place of accident was in good condition, that the switch was what is known as a Standard Switch, Star Brand, of the latest model, comparatively new (Rec., p. 91), and that the track at this place is straight and in a level country, that there had been no rain or snow, that the weather was fair. It was likewise shown without controversy that no fact was known to the defendant company which would put it upon inquiry as to the necessity of watching or inspecting this switch in the night time, as also appeared from plaintiff's witness, J. H. Talley, who was a peace officer. It appeared from the testimony of Mrs. Mary J. McGinnis that the plaintiff, Nelta Saunders, is a married woman, supported by her husband (Rec., p. 56), and there was no evidence to indicate that the deceased would likely have ever made contributions to her of any kind, and there was no allegation to this effect in plaintiff's petition. There is a statute in Texas and known as Chapter 163, Acts of the 29th Legislature, reading as follows:

"Section 1. That in any suit against a person, corporation or receiver operating a railroad or street railway for damages for the death or personal injury of an employee or servant, caused by the wrong or negligence of such person, corporation or receiver, that the plea of assumed risk of the deceased or injured employee where the ground of the plea is knowledge

or means of knowledge of the defect and danger which caused the injury or death shall not be available in the following cases:

"First. Where such employee had an opportunity before being injured or killed to inform the employer or a superior entrusted by the employer with the authority to remedy or cause to be remedied the defect, and does notify or cause to be notified the employer or superior thereof within a reasonable time, provided it shall not be necessary to give such information where the employer or such superior thereof already knows of the defect.

"Second. Where a person of ordinary care would have continued in the service with the knowledge of the defect, and danger and in such case it shall not be necessary that the servant or employee give notice of the defect as provided in subdivision 1 hereof.

"Section 2. The fact that there is now no adequate law protecting employees on railroads in their employment from damages in operating defective machinery, creates an emergency and an imperative public necessity that the constitutional rule which requires bills to be read on three several days in each house be suspended, and said rule is hereby suspended, and this Act shall take effect and be in force from and after its passage, and it is so enacted."

SPECIFICATIONS OF ERROR.

FIRST.

The Court of Civil Appeals of the Third Supreme Judicial District of the State of Texas erred in holding

that the plaintiff in error herein was liable in damages for the death of W. T. McGinnis, and in failing to hold that the deceased assumed the risk of the injuries received by him, and of the danger thereof, under the Federal Employer's Liability Act, same being the act approved April 22, 1908, 35 Stat., 65 Ch. 149, as applied to the facts of this case.

SECOND.

The Court of Civil Appeals of the Third Supreme Judicial District of Texas erred in overruling and failing to sustain the Twenty-first assignment of error presented in that Court, said assignment complaining as it did of the failure of the trial court to grant it a new trial, and being as follows:

"The Court erred in failing and refusing to set aside the verdict returned herein, and in failing to give the defendant a new trial on the fifteenth ground of its amended motion therefor, which was as follows:

" 'The evidence shows without conflict that it was not usual or customary under normal conditions to inspect the track, switches and switch-stands in the night time; that the conditions at the time of this wreck were normal; that the switch in question was located on straight track, on level ground in a clear country; that there had been no rainfall for some time previous to the accident which made it necessary or proper to keep track walkers doing service in the night time; that there were no usual circumstances in being, which rendered it expedient for the defendant to have the switches and switch-stands inspected in the

night time; that it was well known and well understood by all operatives of trains, including the deceased, that under normal conditions, the track, switches and switchpoints were not and would not be inspected in the night time; that the deceased knew on the night in question, or it is fair to assume that he knew, that the switch and switchstand at the point in question had not been inspected later than six o'clock on the afternoon before. Under this state of the evidence the deceased clearly assumed all risks growing out of the failure to inspect the track switches and switch stand during that night.'

" ' It was one of the ordinary risks of the service, well known by all engineers, and for each and all of these reasons the verdict of the jury is against the manifest weight and great preponderance of the testimony." '

THIRD.

It having been admitted that this suit was maintained under the Federal Employer's Liability Act, and that the rights and liability of the parties are to be determined by that act, the Court of Civil Appeals of the Third Supreme Judicial District of Texas erred in holding that the plaintiff in error was liable for its failure to inspect its track and switches at night (which failure was the only theory upon which, under the evidence, the Court of Civil Appeals could have affirmed the judgment herein), and that the deceased did not assume the risk growing out of the failure of the plaintiff in error to inspect its track and switches

in the night time. The Assumed Risk statute of Texas, known as Ch. 163, 29th Legislature of the State of Texas, approved April 4, 1905, is wholly inapplicable, as under the Federal Employer's Liability Act, as applied to the facts of this case, the deceased did assume all risk growing out of the failure of the railway company to inspect its tracks and switches in the night time.

FOURTH.

The Court of Civil Appeals of the Third Supreme Judicial District of Texas erred in holding that the trial court committed no error in failing and refusing to give to the jury plaintiff in error's special charge No. 10, which was as follows:

" 'You are charged that you cannot find any damages in favor of Nelta Saunders, alleged to be a daughter of W. T. McGinnis, because the proof shows that she is a married woman, and is supported by her husband, X. B. Saunders, and there is no proof that she had any expectation of any pecuniary assistance from her said father, W. T. McGinnis, nor is there any allegation in the petition that she had any expectation of such assistance if her father had lived.' "

FIFTH

The Court of Civil Appeals of the Third Supreme Judicial District of Texas erred in holding that the trial Court committed no error in failing and refusing to set aside the verdict returned on the ninth ground of the amended motion for a new trial, which was as follows:

"In no event should a verdict have been returned in favor of Nelta Saunders. The evidence showed that she was a married woman, who was supported by her husband, and there was no evidence showing, or tending to show, that she received any contributions from her father, or that she would likely receive such contributions in the future. Judgment, therefore, awarding her damages was without evidence to sustain it, and same should be set aside," and said Court of Civil Appeals erred in holding that under the Federal Employers' Act plaintiff in Error would be and is liable in damages to the married daughter of the deceased whether such daughter received contributions from the deceased, or had expectation in the future of so doing, or not.

BRIEF OF ARGUMENT

The questions presented by the errors assigned are: First, whether or not, under the facts, the deceased assumed the risk of the danger he encountered at the time of the accident in question, and, incidentally thereto, whether or not the plaintiffs adduced evidence which warranted the submission of any question to the jury; and, second, whether or not, under the Employer's Liability Act, a married woman, supported by her husband, is entitled to recover just because children are named as beneficiaries in the Act and without a showing that she sustained any such loss by reason of the death of her father, as could be considered an element of damage under said Act.

On the first question presented, it is noted that the testimony of some five witnesses is offered by the

plaintiff to sustain the cause of action declared upon, and in view of the fact that this Court is called upon to decide whether or not the evidence so offered was legally sufficient to warrant recovery, we shall briefly note the same, bearing in mind that the acts of negligence submitted to the Trial Court, on which verdict was returned and the judgment thereon sustained by the Courts in Texas, were embraced in the sixth paragraph of the Court's charge as follows:

"(6) Now if you believe from the evidence that the plaintiff, Mrs. Mary J. McGinnis, is the duly qualified administratrix of the estate of W. T. McGinnis, deceased, and was the wife of W. T. McGinnis at the date of his death, and that Lyle McGinnis, Laland McGinnis and Lamar McGinnis were their minor children, and that Nelta Saunders was their married daughter, and if you further believe from the evidence that on or about the 6th day of October, 1909, in Bell County, Texas, the said W. T. McGinnis was in the employment of the defendant as a railway engineer, and as such was engaged in running one of the defendant's locomotives in the operation of one of the defendant's passenger trains, and that while so employed running said passenger train over its line of railway he ran his engine and train into a defective switch at Silenus, thereby causing the accident in question, and which resulted in the death of W. T. McGinnis; and if you further believe from the evidence that the switch point at said place had worn away, broken off and became defective, or if you find from the evidence that said switch point had become loose or open; and if you further find from the evidence

that the defendant had failed to inspect its said switch and road bed, and had failed to warn W. T. McGinnis of the dangerous condition thereof (if it was dangerous and defective at the place in question at the time above specified) and if you further find that the defendant was negligent in permitting its switch to be and remain in such defective condition (if you find it was in a defective condition) and if you further find that it failed to exercise ordinary care to inspect said switch and track, and if you find that such failure if any, was negligence as that term has been heretofore defined, and if you further find that such negligence, if any, was the direct and proximate cause of the death of W. T. McGinnis, then you will find for the plaintiff and assess the damages as hereinafter directed, unless you should find for the defendant under other instructions given you in this charge."

The witness, McGregor, (Rec. p. 39,) was a passenger on another train that came to the place of the wreck shortly after it occurred, and testified to the condition of the equipment and track at that time, and it is our contention that no inference of negligence can be drawn from his testimony.

The witness, Talley, (Rec. p. 42,) testified that the switch point on the left hand side was open and was a bit worn and crumbled; that it was open sufficient to catch the flange on a wheel of an engine and derail it. He could not tell, however, what caused the wreck to this particular train. That there was more danger in passing over switches than other parts of the track; that he could not tell from his observation as a railroad man what caused the derailment

of this train; that railroad switches are absolutely necessary to the running of trains; that the deceased had been over this track several times, that he knew of; that at the time the witness was at the scene of the wreck the switch was open from one-half to one inch; that he did not know what the condition of the switch was at the time of the derailment, whether it was open or closed; that he did not know what wrecked the train. The point of the switch was battered and worn for about three or four inches back from the point; that if the wheel of the engine had struck the switch point, it would have crumbled it as badly as it was at the time he saw it; that the bridle rod which connected the switch with the switch stand was disconnected, which allowed the switch points to play and that the natural tendency of the switch would be to open a little, if there was no bridle rod to hold it in place; that the switch stand at the time he was at the scene of the wreck and its connecting rod had no control whatever over the switch; that if the switch was open at the time the train struck it, the derailment would have occurred without regard to the condition of the end of the switch point.

E. F. Gresham (Rec. p. 49) was the mail clerk on the train that was derailed and testified as to the speed of the train prior to the wreck, and sudden stop, and condition of the switch light; that the switch was partly open and that the bridle rod which connected the same with the switch stand was disconnected.

J. E. Newman (Rec. p. 53,) visited the scene of the wreck the next morning and examined the switch,

which was open at the points about three-quarters of an inch and sufficient to catch the flange on the wheel of an engine. The switch point was worn off.

J. W. Hardy (Rec. p. 55) testified in effect that he was at the scene of the wreck the next morning and saw the switch was partly open and the point crumbled off.

It appears without controversy that the switch stand and switch connection at the place of accident had only been in use for about two years; that the switch stand is securely fastened to a tie, which is under and across the track and extends out seven feet from the nearest rail. The pitman rod is a rod that connects the switch stand with the switch. It extends under the nearer rail, is securely bolted to both prongs of the switch and is held in position at and with the switch stand by what is called a lug, which lug is constructed of boiler steel about half an inch thick, and when this lug is in position it is impossible to disconnect the pitman rod from the switch. When the pitman rod is disconnected from this lug, the switch lever has no control over the switch. It was discovered immediately after the accident in question that the lug at this switch stand had been forcibly removed and the pitman rod disconnected. These were physical facts, about which there was no controversy, and in our statement of the case, we referred to pages in the record wherein it was shown that it was not usual or customary for railroad tracks and switches to be inspected in the night time under normal conditions.

An idea of this defence may be obtained by reference to the testimony of W. E. Maxson, General Superintendent, wherein he said: "I am in a position to say that enginemen know that under ordinary normal conditions a track is not inspected in the night time. They know that. The country at Silenus is an open, rolling country, I should say. The switch is located on tangent track. I mean by that straight track." (Rec. p. 95.) The plaintiff offered no evidence on this issue.

It is noted from the Court's charge that recovery was warranted if it should be found, among other things, that defendant had failed to inspect its said switch and road bed and had failed to warn W. T. McGinnis of the dangerous condition thereof, and that defendant was negligent in permitting its switch to be and remain in a defective condition, and if it failed to exercise ordinary care to inspect the switch and track. Hence the main question of law, which was thus determined by the Trial Court and afterwards affirmed by the Appellate Court is that the defendant was guilty of negligence, if it failed to inspect the switch and failed to warn the deceased of its dangerous condition. There is no question raised in this record as to any failure of the defendant to perform its duty relative to this track in the day time, but the position is taken by the administratrix that a period of some eight hours intervened from the time the section men quit work before this accident occurred, which eight hours was in the night time, and that due regard to the safety of a train operative required that no such interval of time should inter-

vene between inspections of the track and switches, and this position is assumed by the Court of Civil Appeals.

The basis, therefore, of the action is failure to inspect in the night time. We understand that negligence may rarely ever be predicated upon the doing of things in the way that they usually and ordinarily have been done, but rather upon the doing thereof in a way and manner different from that in which they have usually and ordinarily been done. Where a business has been conducted in a certain way for a number of years and that way is thoroughly known and understood by those engaged in the business, no negligence may be predicated ordinarily upon the continuance of that course of business, unless it clearly appears that a man of ordinary prudence would not so conduct a business. In other words, the ordinary conduct of a business becomes and is one of the risks usually incident thereto, which risk is assumed by those engaged therein with knowledge thereof, or with a reasonable means of knowledge thereof, in the absence of a statute to the contrary.

It is not contended that there was a violation by the defendant of any statute enacted for the safety of employees, which contributed to the accident in question. Hence, the right of recovery is to be adjudged under the common law doctrine of assumed risk as determined by the Court. The Employer's Liability Act created a new cause of action, but did not limit the defense of assumed risk, except in given cases. The Courts are in accord, as we understand it, on the proposition that the servant assumes all those

risks, such as COMMONLY attend the work. As illustrative thereof, we quote from G. C. & S. F. vs. Kizzah, 86th Texas, 90:

"The Court had in the general charge instructed the jury as follows: 'But the Court further ins[illegible]cts you, that when the plaintiff entered the service of the defendant, he under the law assumed all the risks necessarily incident to the business which he had undertaken to perform, and if you believe that plaintiff was injured while in the employ of defendant, and that such injury was not the result of negligence on the part of the defendant as the immediate proximate cause of such injury, but was the danger appertaining to the business which plaintiff had undertaken to discharge, then you will find for the defendant.' The effect of this charge was to inform the jury, that in order to exempt the defendant from liability to the plaintiff for his injury, such injury must have been occasioned by a danger necessarily incident to the performance of the duty undertaken by plaintiff. This restricted the risks which the plaintiff assumed to those which always attend the performance of the work; whereas the law is, that he assumed such as commonly attend such work. In view of the charge given, and the fact that the testimony tended to show that the danger was one common to the employment, but not necessarily attending it, the charge asked, or one embodying the main point in it, was important to the proper determination of the liability of the defendant, and should have been given. The refusal was an error that may have caused serious detriment to appellant's rights."

The master is not an insurer and need only exercise ordinary care to furnish the servant a reasonable safe place to work, and where the servant knows the degree of care that has been ordinarily used and continues in the service without complaint, such method and manner is assumed as a risk thereof. (Washington R. R. Co. vs. McDade, 135 U. S., 569.) In this case the only inference that can be indulged is that it has never been usual or customary to inspect the track and switches in the night time; that all of the employees knew this; that the deceased had been in defendant's service for more than twenty years and was familiar with its rules. It will not do then to say that simply because an accident happened during the night, and that during the night and previous to the accident the defendant could have inspected the switch, its failure so to do was negligence. This situation, we think, is fully covered in Butler vs. Frazee, 211 U. S., 467, as follows:

"But where the conditions are constant and of long standing, and the danger is one that is suggested by the common knowledge which all possess, and both the conditions and the dangers are obvious to the common understanding, and the employee is of full age, intelligence and adequate experience, and all these elements of the problem appear without contradiction from the plaintiff's own evidence, the question becomes one of law for the decision of the Court. Upon such a state of the evidence a verdict for the plaintiff cannot be sustained, and it is the duty of the judge presiding at the trial to instruct the jury accordingly. Patton vs. Texas & Pacific

Railway Co., 179 U. S., 658, and cases there cited. The case at bar falls within this class."

This is an affirmance of the doctrine announced in T. & P. vs. Archibald, 170 U. S., 665 and other cases. We are warranted in saying that the evidence in this case shows that when the deceased took charge of the engine on the night in question, (knowing as he did the character of the weather and the rules of the Company), that there had not been and would not be any track walkers going over the road during the night time, and that no one would be inspecting the switches or other portions of the track, he, as a man of ordinary prudence, must necessarily have known that if any of the switches were tampered with during the night time, no officer of the Company or employee, charged with the duty of inspection, would know it until the next day, and yet he made the run voluntarily and as he had been doing for years. The opportunities of the master and servant in that case were equal. The servant had the right to assume that necessary inspection had been made in the day time, but he had no right to assume that conditions arising after six o'clock would or could be known by those in charge thereof during the night. This then became one of the ordinary risks of the business. It was the common method of conducting the road.

It was necessary for the plaintiff to show something more than the derailment and resulting death before recovery was warranted. The Employer's Liability Act only makes a Railway Company responsible for such injuries resulting in death as are occas-

sioned by negligence, and the burden is therefore, upon one seeking recovery to show negligence and to establish it in a direct and affirmative way. This is but the statement of the rule which has long been recognized. In other words, negligence must be shown by affirmative proof, and to fix the liability on a master for injuries resulting in death, such negligence must not only be shown, but must be proved to have been the proximate cause of the injury. (M. K. & T. Ry. Co. vs. Greenwood, 89th S. W. R., 812.) Nor is it sufficient that the plaintiff show that the accident could have happened in such a way as that negligence may be inferred, but the proof must be direct and positive as to how it occurred and that the "how" was negligence. We can do no better in this connection than quote from Patton vs. T. & P. Ry. Co., 179 U. S., 663, in which case the accident was to a fireman who attempted to step off the engine and in doing so the step turned and caused him to fall. It appeared that the step may have been loosened from the ordinary working of the engine. It may have struck something on the trip. It may have resulted from the dropping on the step of large lumps of coal. The Court, speaking through Mr. Justice Brewer, said:

" Upon these facts we make these observations: First, that while in the case of a passenger the fact of an accident carries with it a presumption of negligence on the part of the carrier, a presumption which in the absence of some explanation or proof to the contrary is sufficient to sustain a verdict against him, for there is prima facie a breach of his contract to carry safely,

Stokes vs. Saltonstall, 13 Pet. 181; Railroad Company vs. Pollard, 22 Wall., 341; Gleeson vs. Virginia Midland Railroad, 140 U. S., 435, 443, a different rule obtains as to an employee. The fact of accident carries with it no presumption of negligence on the part of the employer, and it is an affirmative fact for the injured employee to establish that the employer has been guilty of negligence. Texas & Pacific Railway vs. Barrett, 166 U. S., 617. Second, that in the latter case it is not sufficient for the employee to show that the employer may have been guilty of negligence—the evidence must point to the fact that he was. And where the testimony leaves the matter uncertain and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion. If the employee is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony, and no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs. Third, that while the employer is bound to provide a safe place and safe machinery in which and with which the employee is to work, and while this is a positive duty resting upon him, and one which he may not avoid by turning it over to some employee, it is also true that there is no guaranty

by the employer that place and machinery shall be absolutely safe. Hough vs. Railway Company, 10 Otto, 213, 218; Baltimore & Ohio Railroad vs. Baugh, 149 U. S., 368, 386; Baltimore & Potomac Railroad vs. Mackey, 157 U. S., 72, 87; Texas & Pacific Railway vs. Archibald, 170 U. S., 665, 669. He is bound to take reasonable care and make reasonable effort, and the greater the risk which attends the work to be done and the machinery to be used, the more imperative is the obligation resting upon him. Reasonable care becomes then a demand of higher supremacy, and yet in all cases it is a question of the reasonableness of the care—reasonableness depending upon the danger attending the place or the machinery.

"The rule in respect to machinery, which is the same as that in respect to place, was thus accurately stated by Mr. Justice Lamar, for this Court, in Washington & Georgetown Railroad vs. McDade, 135 U. S., 554, 570:

"' Neither individuals nor corporations are bound, as employers, to insure the absolute safety of machinery or mechanical appliances which they provide for the use of their employees. Nor are they bound to supply the best and safest or newest of those appliances for the purpose of securing the safety of those who are thus employed. They are, however, bound to use all reasonable care and prudence for the safety of those in their service, by providing them with machinery reasonably safe and suitable for the use of the latter. If the employer or master fails in this duty of precaution and care, he is responsible for any injury which may happen through a defect of machinery which was,

or ought to have been known to him, and was unknown to the employee or servant.' "

" Tested by these rules we do not feel justified in disturbing the judgment approved as it was by the trial judge and the several judges of the Circuit Court of Appeals. Admittedly, the step, the rod, the nut, were suitable and in good condition. Admittedly, the inspectors at El Paso and Toyah were competent. Admittedly, when the engine started on its trip from El Paso the step was securely fastened, the plaintiff himself being a witness thereto. The engineer used it in safety up to the time of the engine's return to El Paso. The plaintiff was not there called upon to have anything to do with the engine until after it had been inspected and repaired. He chose, for his own convenience, to go upon the engine and do his work prior to such inspection. No one can say from the testimony how it happened that the step became loose. Under those circumstances it would be trifling with the rights of parties for a jury to find that the plaintiff had proved that the injury was caused by the negligence of the employer."

The Supreme Court of Texas in H. & T. C. Ry. vs. Harrager, 14 S. W. R., 242, said: "To say that the burden is upon the servant to show negligence upon the part of the master when he seeks to recover damages for injuries resulting from defective machinery is but to announce the elementary proposition that the plaintiff must prove his case, and we are of the opinion that negligence on the part of the railway company is not to be inferred from the mere fact that a draw head has become detached from the operation of the

moving train;" and in the case of G. C. & S. F. Ry. Co. vs. Kizziah, 86th Texas, 88, in discussing this same general proposition, used this language:

"The Court of Civil Appeals made no finding upon this issue in its conclusions of fact, but in the conclusions of law occurs this statement: 'It is contended that there was no evidence that the air brakes were in any respect defective. The evidence bearing upon that issue was, in our opinion, extremely meager. There were, however, circumstances indicating that the air brakes were defective. These circumstances consist mainly in the fact that they were not sufficient to hold the detached cars, though the latter were on ground apparently level, or nearly so, and that the air brake holding the baggage car, on which the work was being done, was sufficient to keep it stationary.' These circumstances establish only the fact that the cars moved, but do not prove the cause of their moving. They constitute proof that the air brakes did not hold the cars on that occasion, but do not prove that this was caused by a defect in the brakes, which may have been imperfectly set, or from other causes may have failed on this occasion."

To the same effect is Trinity Lumber Company vs. Denham, 85th Texas, 56, and Holbrook vs. Railway 12 N. Y., 236. It was for the purpose of emphasizing this proposition that we stated the salient features of plaintiff's evidence in this case, and an analyis of this testimony will show that the plaintiff proved that the end of the switch point, where the derailment occurred, was worn off for some inches, which made it defective, but there is no evidence to the effect

that the condition of the switch point contributed to the wreck. It is prominent throughout all the evidence that if the switch was open sufficiently to catch the flange on the wheel of the engine the derailment would have occurred without regard to the condition of the switch point, and further, that if the switch had been closed at the time this train passed, there would have been no wreck. In other words, it was the fact that the switch was open at the time this train struck it that caused the accident, and whether the point of the switch was worn or not became and is immaterial. That the switch was partly open can admit of no doubt, that the lug which held the bridle rod in position with the switch stand had been removed and the bridle rod taken off is equally established, as is the further proposition that with the bridle rod secure in its position on the switch stand, the switch would have been closed, and there would have been no accident. Hence our position that the plaintiff made no such showing as to the cause of the wreck indicating negligence that would warrant recovery, unless it be held that it was the duty of the railway company to have inspected this switch during the night time, and that deceased did not assume the risk of failure to do and to so hold would be imposing a condition of supervision unusual on railroads, and not in contemplation of employment at the time the deceased or any other train operative took and remained in the service. In the last analysis of this case, the only theory on which judgment may be sustained is that there was negligence in failing to make a night time inspection of the switch. The Court is not called upon

to determine a disputed question of fact, but merely to adjudge the legal sufficiency of the evidence to sustain the verdict under established rules of law. This we understand, is the province of this Court. Lumber vs. Richards, 151 U. S., 607; Marlow vs. Pullen, 4 Howard, 447.

It was because there seemed to be no dispute in the evidence, and therefore nothing to submit to the jury, that we requested the Court to give the peremptory charge.

We have inserted the Texas Statute on the subject of assumed risk for the purpose of indicating the modification in the common law rule which obtains in this State, and under which question of fact may arise to be determined by a jury, when the defense is interposed, but that statute is inapplicable here and the issue presented in this case should be determined under the common law rule because of which, as stated, no liability was shown.

WAS THE MARRIED DAUGHTER ENTITLED TO RECOVER?

Our second proposition, which involves a consideration of the fourth and fifth specifications of error, presents the question as to whether or not a married woman, who is supported by her husband and for whom there is nothing to indicate a reasonable expectation of future financial benefits from her father, is entitled to recover in an action for his death under the Federal Employers Liability Act. The Act provides, in effect and primarily, that the action shall be maintained by a personal representative

for the benefit of the surviving widow and children, and the Court of Chancery interpreted this to mean that each and all of the children were entitled to recover without regard to whether they were dependent upon the deceased, or had the right to expect pecuniary assistance from him. (Vol. 31, 122.) In other words, the effect of the holding is that if the death of the parent was negligent, each and all of the children were entitled to recover, without regard to their status, or any showing as to pecuniary loss sustained or likely to be sustained.

There is a difference, as we believe, between a right of action, and a right of recovery, and it is this very reason that there must be a showing of both a right of action and a right of recovery before judgment is warranted. If this was no reason why the adult son could maintain an action for injuries resulting in death, the Federal Employers' Liability Act created a right of action, naming the beneficiaries, but it left upon the question as to the right of recovery, whereas there would be no need to offer proof as to the age and financial condition of the deceased, the amount of his income, contributions made or likely to be made. No arbitrary sum was fixed in the act as being the measure of recovery to those entitled to maintain the action. This, therefore, necessarily, is a question of proof. We can imagine that a married daughter might have sustained a financial loss by reason of the untimely taking away of her parent; her marriage may not have been a financial success; she may have been in fact a charge upon the deceased one, under such circumstances

it is conceivable that she could establish a right of recovery, but in cases, as in the instant one, where the proof shows that the married daughter was supported by her husband and there is no evidence or intimation in the record of any fact upon which it may be fairly assumed that her father would ever make a contribution to her, then to assume that this daughter is entitled to recover and to actually award to her the same amount as was awarded to the minor children, who are yet constituent members of the family, entirely dependent upon the deceased for support, is to put a construction upon this statute that would appear to be unreasonable. In actions of this character the sole basis of recovery is the pecuniary loss sustained, which is a question of fact, and the affirmative thereof must be sustained by evidence of the same degree as is necessary to sustain the right of action. The burden of proof is upon those asserting the right of recovery to establish fully the constituent elements thereof. We refer to G. H. & S. A. Ry. Co. vs. Worthy, 87 Texas, 466. While we do not rest that this question has been directly determined by this Court, we call by analogy, we direct attention to Pithian vs. St. Louis & S. F. Ry. Co., 188 Federal, 843, wherein Judge Trieber said:

"What the measure of damages should be depends to a great extent upon the relationship of the survivors to the deceased, and the pecuniary loss sustained by them by reason of his death. The widow and children are naturally dependent upon him to a greater extent than any other relatives and entitled

to support from the husband and parent. For this reason they would no doubt be entitled to a larger compensation than any other relative. Baltimore & Potomac R Co vs Mackey, 157 U. S., 72, 15 Sup. Ct. 491, 39 L. Ed. 623. Next to them the parents are most dependent upon a son than any other, as there is not only a moral, but a legal duty on the part of a child to contribute towards the support and maintenance of his parents when they are unable to support themselves. The provisions for the benefit of relatives other than those before mentioned is not unlimited as the act expressly provides only for such next of kin as were dependent upon the deceased. The amount of the recovery must naturally depend to a very great extent upon the contribution by the deceased to those for whose benefit the action is prosecuted by the personal representative. If the deceased contributed nothing towards the support of the next of kin and he leaves no widow, children, or parents surviving him there can be no recovery, because they sustained no pecuniary loss by reason of his death."

And in Hirschkovitz vs Penn R R 138 Fed. 438, Kay, District Judge held that in an action for wrongful death the jury may give such damages as shall be deemed just having reference to the pecuniary injury sustained to the wife and next of kin to the deceased, that the verdict should not exceed the value of the pecuniary assistance which each of those entitled thereto would probably receive.

In the case of Swift & Co vs Johnson, 138 Fed. 869, Mr. Justice Van Devanter, then Circuit Judge,

in construing a statute of Minnesota, similar in kind, said:

"The damages recoverable for the benefit of the widow and next of kin are confined to compensation for their strictly pecuniary loss, excluding all consideration of punitive elements, loss of society, wounded feelings of the survivors, and suffering of the deceased; and the extent of the loss is to be determined solely with reference to the pecuniary benefit, reasonably expected by the widow and next of kin, as of legal right or otherwise, from the continued life of the deceased. Shaber vs. St. Paul, Minneapolis & Manitoba Ry. Co., 28 Minn., 103, 107, 9 N. W. 575; Sheffler vs. Minneapolis & St. Louis Ry. Co. 32 Minn. 518, 21 N. W. 711; Robel vs. Chicago, Milwaukee & St. Paul Ry. Co., 35 Minn., 84, 89, 27 N. W. 305; Bolinger vs. St. Paul & Duluth R. Co., 36 Minn. 418, 31 N. W. 856 1 Am. St. Rep. 680; Hutchins vs. St. Paul, Minneapolis & Manitoba Ry. Co., 44 Minn. 5, 9, 46 N. W. 79; Gunderson vs. Northwestern Elevator Co., 47 Minn. 161, 164, 49 N. W. 694; State ex rel. vs. Probate Court of Dakota County, 51 Minn. 241, 53 N. W. 463; Sykora vs. Case Threshing Machine Co., 59 Minn. 130, 60 N. W. 1008; Seiber vs. Great Northern Ry. Co. 76 Minn. 269, 275, 79 N. W. 95; Foot vs. Great Northern Ry. Co., 81 Minn. 493, 84 N. W. 342, 52 L. R. A. 354, 83 Am. St. Rep. 395. . . . .The law in confining the compensation to the pecuniary loss, does not run along the lines of the imaginary and the possible, but rather along the lines of the actual and the probable, and therefore, the reasonable expectation must be made to

appear by the evidence. Conjecture, speculation, and fancy cannot supply the absence of evidence, or avoid the effect of the evidence which is presented. The conditions surrounding the beneficiary and the deceased at the time of the death, their past relations, and the law of human experience are the sole criterion of the expectation and of its reasonableness. Other conditions, or changed relations, not reasonably probable, cannot be conjectured and assumed merely because of the possibility of their accomplishment and their conformity to higher ideals. . . . . Because the evidence conclusively established that the father had lost his legal right to the services and earnings of the son during his minority, and because apart from this legal right, there was no substantial evidence of a reasonable expectation of pecuniary benefit to the father from a continuance of the life of the son, the instruction limiting the recovery to nominal damages should have been given. Atchison, Topeka & Santa Fe Ry. Co. vs. Weber, 33 Kan. 543, 551, 6 Pac. 877, 52 Am. Rep. 543; Coal Co. vs. Limb, 47 Kan. 469, 471, 28 Pac. 191."

It is directly held in this case, that the reasonable expectation of the pecuniary benefit must be made to appear by the evidence—there must be no conjecture. Under the statute there discussed, the right of action was given for the benefit of certain named beneficiaries, and if the reasoning of the Court of Civil Appeals in the case at bar was correct, there was no necessity to prove more than that the plaintiffs were the beneficiaries named, and that the accident resulting in death was occasioned through the negli-

gence of defendant. We think that Judge Van Fleet's decision sustains the contrary view and the contention made in this case. For a case which seems to sustain the same position we refer to Stewart vs. B. & O. R. R., 168 U. S. 450. This is likewise true as to the case of Cain vs. Southern Ry. Co., 109 Fed. 211. We cite also in support of our contention the following cases: B. & P. Ry. vs. Mostyn, 157 U. S. 92; The Dauntless, 121 Federal 499; C. P. & S. L. R. R. vs. Woolridge, 74 Ill. 320.

It is conceivable that a parent will naturally spend more money on himself, who has one dependent for support, than would he or she were there a half a dozen so dependent. The deceased in this instance was a married man and naturally could not devote as much of his earnings to the assistance of four children than he could to one. Nor is it believable that he would devote, or expected to devote in the future as great a proportion of his earnings to a married daughter as to one yet under the parental roof. It is just as fair to assume that the married daughter would contribute to the aged parent in the future as that the aged parent would contribute to her, and yet under the finding of the Texas Courts in this case, without regard to where living or present relationship, financial standing or any other circumstance, a married child must recover on a showing of negligence in the taking off of the parent. The monetary interest involved under these specifications of error is not specially great, but a principle underlies a proper construction of the statute which is quite important. The only testimony affecting the

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JAMES H. McKENNEY,

No. 762

IN THE

Supreme Court of the United States

OCTOBER TERM, 1912

GULF, COLORADO AND SANTA FE RAILWAY COMPANY

Plaintiff in Error,

vs.

MARY J. McGINNIS, ADMINISTRATRIX,

Defendant in Error.

REPLY STATEMENT AND BRIEF OF AUTHORITIES OF PLAINTIFF IN ERROR TO THE MOTION FILED BY DEFENDANT IN ERROR TO DISMISS OR AFFIRM JUDGMENT OF THE COURT OF CIVIL APPEALS AND BRIEF IN SUPPORT THEREOF.

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diction to determine. If a federal question has been raised and the same decided adversely to the right, privilege or immunity claimed under such statute, as provided in Section 709 of the Statute, then the jurisdiction of this court attaches, and it cannot be said, as we view it, that the writ of error was sued out for delay only, or that, in view of the character of the assignments presented by us, that it can be determined on motion that the questions on which the decision of the cause depends are so frivolous as not to need further argument.

Defendant in error seems to base the motion so filed upon the alleged ground that the validity of no statute either state or federal is drawn in question (See page 65 of her argument), but, we think such statement is inaccurate and possibly misleading. We have not contended that the validity of the Act of Congress, known as the Federal Employer's Liability Act, was drawn in question, but what we do contend and what we have presented in our petition for a writ of error and on which our assignments of error are based is, first, that as applied to the facts of this case the acts of the Legislature of the State of Texas affecting the liability of railroads for injuries resulting in death to an employee are inoperative because of a conflict between such Act of Congress on the same subject, commonly known as the Federal Employer's Liability Act, approved April 22d, 1908, and that under the latter act, applied to the facts of this case, the deceased assumed the risk of the danger encountered by him at the time of the accident resulting in his death, while under the acts of the Texas Legislature he did not. Second, that because of the judgment entered by the state courts in this case there is drawn in question here a right, privilege or immunity claimed under a statute of the United States, which right, privilege or immunity was duly presented and decided adversely thereto; and, third, that in no aspect of the case under the Act of Congress should any judgment have been rendered for the use and benefit of the married daughter of the deceased.

It is deemed improper at this time (and on the consideration of this motion) to discuss the merits of the case, and we shall not

do so except as may be necessary to defend our position, which, generally speaking, is that under the record this court has jurisdiction of the cause, and having jurisdiction we are entitled to the determination of the questions presented on their merits, which cannot be secured in the absence of the printed record and before the case is assigned for hearing. In this connection, we direct your attention to the case of Crane Iron Co. vs. Hoagland, 108 U. S., 5, wherein Chief Justice Waite, in passing upon a motion to dismiss a writ of error and to affirm the decision below, said:

"These are writs of error to the Supreme Court of New Jersey, and the motions to dismiss are made because, as is claimed, no federal question is involved. The records have not been printed, and on these motions we can look only to the statements of counsel as they appear in the brief. The assignment of errors has been printed in the brief for the defendants, and the second and fifth assignments clearly present questions of which we have jurisdiction. Whether the errors thus assigned appear in the records we cannot on these motions, as they are now presented, finally determine, but in the absence of any showing to the contrary we will presume they do. The motions to dismiss must therefore be overruled.

"The questions involved are not of a character that we are inclined to consider on a motion to affirm. Especially before the record is printed

"It will be time enough to consider the objections to the assignment of error when the cases come on for hearing.

"The motion to advance the cases cannot be granted upon the showing made."

To the same general effect is the decision in Waterville vs. Vanslyke, 115 U. S., 290. In that case it was decided that in order to get a decision on a motion to dismiss made before printing *the motion papers*, the case must be presented in a way which will enable the Court to act understandingly without reference to the transcript on file, citing National Bank vs. Insurance Co., 100 U. S., 43.

Our assignments of error, which are five in number, present two questions, first, whether or not, under the admitted facts of this case the deceased assumed the risk of the injuries received by him and of the danger thereof under the Federal Employer's Liability Act, and second, whether or not under that act a married woman, supported by her husband, receiving no contributions from the deceased, and without expectation thereof in the future, is entitled to recover, although she is an adult, just because the deceased was her parent. It appears from the pleadings in this case, from the opinion of the Court of Civil Appeals deciding the case, and from our application for writ of error to the Supreme Court of Texas, that these questions were each determined adversely to the right, title, privilege and immunity claimed by us under the Federal Employer's Liability Act.

Mr. Justice Miller in Railroad Company vs. Maryland, 20 Wallace, 643, said:

"Some of the decisions of this court under the act of 1789 would undoubtedly justify the view taken by the counsel of the defendant in error, in support of the motion to dismiss, if it were very clear that the second proposition on which the Court of Civil Appeals placed its judgment was sufficient to control the case, and that it involved no consideration of Federal law.

"But the act of 1789 contained restrictive language not in the act of 1867; and in construing the statute as it now stands, we have ruled in the case of Murdock vs. Memphis, just decided, that where the Federal question has been raised, and has been decided against the plaintiff in error, the jurisdiction has attached, and it must be heard on the merits. To what this examination on the merits shall extend we have in that opinion considered. But until we have determined that the State Court decided erroneously the Federal question which it did decide, we can go no further into the re-examination.

"The Counsel of both parties in this court are entitled to be heard when the records show the existence of a decision which gives us jurisdiction, on the soundness of that decision, on its

sufficiency to control the judgment in the whole case, and on the sufficiency of any other point decided, to affirm the judgment even if the Federal question was erroneously decided.

"For these reasons the motion to dismiss the case is overruled."

It was determined in the case of Murdock vs. Memphis, cited in the Maryland case and reported in the same volume at page 591, that it is essential to the jurisdiction of this court over the judgment of a State Court that one of the questions in the statute must have been raised and presented to the State Court, that it must have been decided by the State Court against the right claimed or asserted by the plaintiff in error under the constitution, treaties, laws or authority of the United States, or that such a decision was necessary to the judgment rendered in the case. The rule or criterion there prescribed has been met and complied with by the plaintiff in error in the case at bar. Stating that rule a little differently, we understand it to mean that to raise a federal question the right must be one claimed under a particular statute of the United States, the validity, consideration or applicability of which was made the subject of dispute in the State Court, and the decision upon such statute must have been adverse to the plaintiff in error.

See Dee Lamar's Nevada Gold Mining Co. vs. Nesbitt, 177 U. S., 523.

It is conceded that the question presented here arose under a particular statute of the United States, to-wit: the Federal Employer's Liability Act, and it appears from the record that the construction or applicability of this statute was the subject of dispute in the State Court, and it is admitted that the decision upon this statute has been adverse to the plaintiff in error.

We direct your attention to the language of Mr. Justice Harlan in Nutt vs. Knutt, 200 U. S., 18:

"The first question is one of jurisdiction of this court. The present plaintiffs in error based their defense in part upon section 3477 of the Revised Statutes, which declares absolutely null and void certain transfers and assignments of claims against the United States. They insisted that the contract sued on was

in violation of that statute; and that they and the estate of Nutt were protected by its provisions against any judgment whatever in favor of the plaintiff. In every substantial sense, therefore, they asserted a right and immunity under a statute of the United States, and such right and immunity was denied to them by the Supreme Court of Mississippi. That court expressly adjudged that the contract was not, on its face, in violation of the statutes of the United States, and could legally be the basis of a valid claim against the Nutt estate. The case, so far as our jurisdiction is concerned, is therefore within section 709 of the Revised Statutes, which authorizes this court to re-examine the final judgment of the highest court of a State, 'where any title, right, privilege or immunity,' is claimed under a statute of the United States, and the decision is against such title, right, privilege or immunity specially set up or claimed. A party who insists that a judgment cannot be rendered against him consistently with the statutes of the United States may be fairly held, within the meaning of section 709, to assert a right and immunity under such statutes, although the statutes may not give the party himself a personal or affirmative right that could be enforced by direct suit against his adversary. Such has been the view taken in many cases where the authority of this court to review the final judgment of the State Court was involved. Logan County National Bank vs. Townsend, 139 U. S., 67-72; Railroads vs. Richmond, 15 Wall, 3; Swope vs. Leffingwell, 105 U. S., 3; Anderson vs. Carkins, 135 U. S., 483-486; McNulta vs. Lochridge, 141 U. S., 327; Metropolitan Bank vs. Claggett, 141 U. S., 520; McCormick vs. Market Bank, 165 U. S., 538-546; California Bank vs. Kennedy, 167 U. S., 362. We perceive no sufficient reason to modify the views expressed in those cases as to our jurisdiction. It is true there are some cases which, it is contended, justify a contrary view. We will not now stop to examine those cases narrowly and to declare wherein they may be in conflict with the cases above cited. Suffice it to say, that upon a careful reconsideration of the whole subject, and after reviewing all the cases bearing upon the precise question

of jurisdiction now before us, we reaffirm the views expressed in the above-cited cases, as demanded by the statutes regulating the jurisdiction of this court."

We direct particular attention to this case not only because it is one of the last announcements of the court, but because it is there held that "a party who insists that a judgment cannot be rendered against him consistently with the statutes of the United States may be fairly held, within the meaning of section 709, to assert a right and immunity under such statutes."

In L. & N. R. R. vs. Melton, 218 U. S. 40, the Court said:

"We primarily dispose of a motion to dismiss, which is rested upon the ground that the Federal question relied upon has been so conclusively foreclosed by prior decisions of this court as to cause it to be frivolous, and therefore not adequate to confer jurisdiction. The contention may not prevail, even although it be admitted that a careful analysis of the previous cases will manifest that they are decisive of this. We say this because, for the purpose of the motion to dismiss, the issue is not whether the Federal question relied upon will be found upon an examination of the merits to be unsound, but whether it is apparent that such question has been so explicitly foreclosed as to leave no room for contention on the subject and hence causes the question to be frivolous."

We also refer to Green Bay and Mississippi Canal Co. vs. Patten, 172 U. S., 58, and Erie Railroad Company vs. Purdy, 185 U. S., 148, and C. B. & Q. Ry. Co. vs. People of Illinois, 200, U. S., 561. In order that you may clearly see that the State Court understood our contention and determined the issue so presented, we quote the following from the opinion of that court.

"It is conceded that this suit was brought by virtue of the Federal Employer's Liability Act of April 22d, 1908, 35th Stat., 65, Chapter 149, which was amended April 5, 1910; 36th Stat., 201, Chapter 143."

While the court will not undertake to determine questions of fact on which evidence pro and con was offered in the State Court, and there decided, but the court will determine the

competency and *legal effect* of the evidence as bearing upon a question, and, as shown by our assignments of error, we contend that upon the *legal effect* of all of the evidence bearing upon the issue, the deceased under the Federal law assumed the risk of the danger encountered by him at the time of the accident. Dower vs. Richards, 151 U. S., 667.

"When, indeed, the question decided by the State Court is not merely of the weight or sufficiency of the evidence to prove a fact, but of the competency and legal effect of the evidence as bearing upon a question of Federal law, the decision may be reviewed by this Court. It was accordingly said by Mr. Justice Catron: 'The powers of the Supreme Court are limited in cases coming up from the State Courts, under the twenty-fifth section of the Judiciary Act, to questions of law, where the final judgment or decree draws in question the validity of a treaty or statute of the United States, etc., or where their construction is drawn in question, or an authority exercised under them; and as the admission of evidence to establish the mere fact of boundary in regard to the extent of grant cannot raise a question involving either the validity or construction of an act of Congress, etc., this Court has no jurisdiction to consider and revise the decision of a State Court, however, erroneous it may be in admitting the evidence to establish the fact. But when evidence is admitted as competent for this purpose, and it is sought to give it effect for other purposes which do involve questions giving this Court jurisdiction, then the decisions of State Courts on the effect of such evidence may be fully considered here, and their judgments reversed or affirmed, in a similar manner as if a like question had arisen in a Supreme Court of error of a State, when reversing the proceedings of inferior courts of original jurisdiction.' Mackay vs. Dillon, 4, How. 421, 447. The only questions of evidence considered in that case arose upon a bill of exceptions to the legal competency of evidence relied on to prove a title under an Act of Congress.

"Again, in Almonester vs. Kenton, Mr. Justice Catron said: 'Now that this Court has no jurisdiction, under the twenty-

fifth section of the Judiciary Act of 1789, to re-examine the decision of a State Court, which drew in question the mere fact of where a dividing line between two tracts of land was, is too plain for discussion. Had the decision of the Supreme Court of Louisiana stopped here, then certainly jurisdiction would be wanting.' 9 How. 1, 7. And this Court assumed jurisdiction of that case solely because the State Court had gone further, and had given a construction to an Act of Congress.''

The State Court gave a construction to an Act of Congress, which denied to us a right, privilege or immunity under such act.

It was held in St. L. I. M. & S. Ry. vs. Taylor, 210, U. S., 281, that the denial by a State Court to give to a Federal statute the construction insisted upon by a party which would lead to a judgment in his favor, is a denial of a right of immunity under the laws of the United States, and presents a Federal question reviewable by this Court under Section 709 Revised Statutes.

The trial court submitted as an issue of fact to be determined, whether or not the deceased did assume the risk of the danger encountered by him at the time of the accident, when there was no dispute in the evidence as to the conditions surrounding his work, and that there was a general knowledge among all engineers that no inspection of the railway tracks and switches was made in the night time, and the charge of the Court further warranted and directed a finding for the benefit, among others, of a married daughter of deceased, in the face of an adverse showing as to her, of any damage or injury, so far as the proper elements of damage of this character are concerned; and in view of these things, as said by this Court in Illinois Central Railroad vs. McKendree, 203 U. S., 525, the State Courts necessarily decided against the right, title or immunity asserted by the defendant. The action was brought by the personal representative for the benefit of the surviving widow and children, as required by the statute, but in our view something more must be established than to prove that deceased was in the service of an interstate carrier, engaged in interstate commerce at the time of the accident before recovery

is warranted. The burden of proof in such an action, is on the plaintiff, and this burden extends to the question as to whether or not a pecuniary loss has been sustained by those for whose benefit the suit is brought. Otherwise, the amount of damage would be fixed by statute.

The Court of Civil Appeals held, in construing the Federal Employer's Liability Act, and, speaking directly to the questions presented by our fourth and fifth assignments here as follows:

"Nor do we think the Court erred in refusing to give appellant's special charge, urging that since the proof showed that Mrs. Nelta Saunders was a married woman, and failed to show that she had any expectation of pecuniary assistance from her father, that she was therefore not entitled to recover damages on account of his death; because said statute expressly authorized the suit to be brought by the personal representative for the benefit of the surviving wife and children of the deceased, irrespective of whether they were dependent upon him or had the right to expect any pecuniary assistance from him."

It is our contention that it was necessary for the plaintiff to show a resulting loss, especially as to those among them who had ceased to be subjects of parental care. The measure of recovery in actions resulting in death has been very frequently considered by the courts and the rule seems to be universal, or practically so, that the measure of such damage is the pecuniary loss sustained by those for whose benefit remedy is given. This was announced by the Circuit Court for the Western District of Arkansas in Fithian vs. St. L. & S. F. Ry., 188 Federal, 842, wherein was under discussion the Employer's Liability Act of April 22nd, 1908. The Court referred to Stewart vs. B. & O. Ry., 168 U. S., 445, wherein this Court held, in discussing a statute of the District of Columbia of similar kind, that the award to certain prescribed heirs was only for the damages resulting to them from the taking away of their relative, and in this connection we refer to the holding of Judge Van Devanter in Swift & Co. vs. Johnson, 138 Federal, 869, and from which we quote as follows:

"The damages recoverable for the benefit of the widow and next

of kin are confined to compensation for their strictly pecuniary loss, excluding all consideration of punitive elements, loss of society, wounded feelings of the survivors, and suffering of the deceased; and the extent of the loss is to be determined solely with reference to the pecuniary benefit reasonably expected by the widow and next of kin, as of legal right or otherwise, from the continued life of the deceased."

"Because the evidence conclusively established that the father had lost his legal right to the services and earnings of the son during his minority, and because, apart from this legal right, there was no substantial evidence of a reasonable expectation of pecuniary benefit to the father from a continuance of the life of the son, the instruction limiting the recovery to nominal damages should have been given."

So that, in construing the Federal Employer's Act, as warranting recovery in favor of an adult daughter supported by her husband, and without prospect of receiving any aid from the deceased had he lived, we contend that a right, privilege or immunity arising under a Federal statute was abridged and denied by the State Courts.

Again, under the Act of April 22nd, 1908, the defense of assumed risk is recognized, and, except in cases where the violation by the carrier of some statute enacted for the safety of employees, contributed to the death of such employee, it is a complete defense when established, and it is not alleged, nor has it been contended that there was a violation of any statute enacted for the safety of employees which contributed to the death of W. T. McGinnis. We have represented in our assignments of error that under the evidence adduced and under all of the evidence, the accident out of which this suit arose fell within one of the risks ordinarily and naturally assumed by him as a locomotive engineer. We present, as a matter of law, that this is the legal effect of the evidence, and that no other construction can be placed upon the case as made by the plaintiff on the trial. We will not at this time discuss the law of assumed risk further than may be necessary to indicate that it is a substantial

defense. The fact of accident carries with it no presumption of negligence on the part of the employer, but it is an affirmative fact for the injured employee to establish that the employer has been guilty of negligence. Such was the holding of this Court in T. & P. Ry. Co. vs. Barrett, 166 U. S., 617, and Patten vs. T. & P. Ry. 179 U. S., 653. It is likewise established by the rule of decision, as we understand it, that the employee assumes all of those risks ordinarily incident to his business which he knows, or in the exercise of ordinary care should have known.

We quote from Butler vs. Frazee 211 U. S., 467:

"Where the conditions are constant and of long standing, and the danger is one that is suggested by the common knowledge which all possess, and both the conditions and the dangers are obvious to the common understanding, and the employee is of full age, intelligence and adequate experience, and all these elements of the problem appear without contradiction from the plaintiff's own evidence, the question becomes one of law for the decision of the court. Upon such a state of the evidence a verdict for the plaintiff cannot be sustained, and it is the duty of the judge presiding at the trial to instruct the jury accordingly. Patton vs. Texas & Pacific Ry. Co., 179th U. S. 658, and cases there cited. The case at bar falls within this class."

The cause of action arising under an Act of Congress, which Act distinctly recognizes the defense of assumed risk, we think that we may properly contend that the failure of the State Courts to give effect to that defense is and was such a denial of a right, title, privilege or immunity as is mentioned in Article 709, that jurisdiction to hear and determine the case upon its merits has been and is, conferred upon this court. There is in Texas a statute, which, to all intents and purposes, destroys or materially modifies the defense of assumed risk. Prior to its enactment the rule in Texas upon that subject was the same as seems to be the rule of this court. In Missouri Pacific Ry. Co. vs. Somers, 71 Texas, 700, and 78 Texas, 439, it was held that a trainman's ignorance of the dangerous location of one cattle guard was immaterial,

where it appeared that he had knowledge that many of them were defective, which knowledge put him upon notice, and threw the risk upon him.

In Green vs. Cross & Eddy, 79 Texas, 130, it was held that a section hand, knowing the condition of the road over which he was accustomed to pass upon a hand car in going to and returning from his work, assumed the risk of passing over a defective rail, his knowledge of the general defective condition being sufficient without actual knowledge of the particular defective rail which caused the injury. (See also Ry. Co. vs. Rea, 99 Tex., 58.) It is likewise established that where the opportunities of the master and servant are equal to ascertain and know the dangers surrounding a particular character or work and service, the servant assumes the risk attending such work and service. Bonnet vs. G. H. & S. A. Ry. Co. 89 Texas, 73; T. & P. Ry. Co. vs. French, 86 Texas, 96; St. L. S. W. vs. Hynson, 101 Texas, 543; St. L. S. W. Ry. Co. vs. Briscoe, 100 Texas, 354.

It necessarily follows from the allegations in our application for writ of error, as well as from our assignments of error, that the rule announced in those cases was not followed by the State Courts in determining this case on the facts, and to that extent we contend that there was, and is, a conflict between the statutes of Texas and the Employer's Liability Act on the question of assumed risk, and that it was the duty of the State Courts to follow the latter, and its failure so to do was, as we contend, a denial to the litigant of a trial of this case under the laws of the United States, which is sufficient to confer jurisdiction upon this court.

WHEREFORE, we submit that serious questions are presented by this record, which we think is shown from the allegations in our petition for writ of error, and amplified by our assignments of error. We shall, if allowed, and within the proper time, present our brief and argument fully on the merits of this case, and confidently believe that we shall be able to establish a meritorious defense, and, therefore, respectfully insist that as it is apparent from the record that a Federal question is duly

presented, which question was presented for the record in the State Court, the motion now presented by the defendant in error should be overruled.

Respectfully submitted,

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IN THE SUPREME COURT
—of the—
UNITED STATES
October Term, 1912.
No. 762.

GULF, COLORADO & SANTA FE RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

MARY J. McGINNIS, Admintratrix, of the Estate of W. T. McGinnis, Deceased, Defendant in Error.

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Statement.

W. T. McGinnis, a locomotive engineer, while in the discharge of his duty operating an engine drawing a southbound fast passenger train out of Temple on the Appellants' road on the night of October 6th, 1909, was fatally injured at Silenus on account of a derailment, and this suit was brought by Mrs. Mary J. McGinnis in a State Court, to-wit, in the District Court of Bell County, Texas, as Administratrix of the estate of W. T. McGinnis, deceased, for the benefit of herself as surviving wife, and also for the benefit of his four children, three of whom

were minors and one a married daughter, Mrs. Nelta Saunders, alleging that said derailment occurred on account of a defective switch which Appellant had negligently failed to inspect and warn deceased of. This suit was prosecuted under and by virtue of the Federal Employers' Liability Act of April 22nd, 1908, which was amended April 5th, 1910, which provides that suit to recover damages based thereon must be brought by the personal representative of the deceased for the use and benefit of the surviving wife and children of the deceased or other beneficiaries, in the absence of such next of kin.

Defendant in Error alleged in her petition that at the time and place of said injury the Plaintiff in Error negligently and carelessly failed to provide a safe track and road bed for said train to run over. That the Plaintiff in Error carelessly and negligently permitted its said track and switch located at this point to be and remain in said dangerous condition, and permitted said switch to be and remain open at said place, and permitted its rails to become out of alignment at said point, and permitted its switch point to become worn away, broken off and defective, and negligently permitted said switch to become loose, and to remain in such condition, and

that said Plaintiff in Error had carelessly and negligently failed to inspect its track and switch, and had failed to discover the state of its said switch and track, and had failed to repair and remedy the same, and had failed to provide any warning to the said W. T. McGinnis of the fatally dangerous condition thereof, and on account of Plaintiff in Error's negligence in the premises said train was derailed and W. T. McGinnis was injured as aforesaid. (Record, pages 1 and 2.)

The plaintiff in Error, answering the petition, denied all of the allegations therein contained, and also plead assumed risk, and that some evil-minded person in no way connected with the Railway Company had misplaced the switch so as to cause the wreck. (Record, pages 4 and 5.)

After the evidence was introduced the Court submitted the following charge to the jury:

In the District Court of Bell County, Texas, June Term, A. D. 1911.

No. 7577.

Mary J. McGinnis

vs.

G., C. & S. F. Ry. Co.

Gentlemen of the Jury: The plaintiff, Mrs.

Mary J. McGinnis, brings this suit as administratrix of the estate of W. T. McGinnis, deceased, and she alleges that she has been duly appointed by the county court of Bell County and has qualified as such administratrix as required by law.

She alleges that as such administratrix she brings this suit for the benefit of herself as the surviving wife of W. T. McGinnis and for the benefit of the children of herself and W. T. McGinnis, deceased, towit, Laland McGinnis, a boy nineteen years old; and Lyle McGinnis, a girl thirteen years old; and Lamar McGinnis, a boy about three years old; and Nelta Saunders, wife of X. B. Saunders.

Plaintiff alleges that the death of the said W. T. McGinnis occurred at Silenus, about three miles southeast of Temple, in Bell County, Texas, on or about the 6th day of October, 1909, and was caused by the negligence of the defendant company in that it carelessly failed to provide a safe track and roadbed for the train which W. T. McGinnis was then upon as engineer in the service of defendant to run over, and negligently and carelessly permitted its said track and switch located at Silenus to be and remain open at said place, and permitted its switch point to become worn away, broken off and defect-

ive, and negligently permitted its said switch to become loose and to remain in such condition, and negligently and carelessly failed to inspect its track and switch, and had failed to repair and remedy the same, and had failed to provide any warning to the said W. T. McGinnis of the dangerous condition thereof, and that on account of said negligence the said train was derailed and that W. T. McGinnis sustained injuries which resulted in his death.

Plaintiff alleges that the negligence complained of was the direct and proximate cause of the death of W. T. McGinnis, and that by reason thereof those for whose benefit she brings this suit have sustained injuries in the sum of seventy-five thousand ($75,000) dollars, and for which she prays judgment.

The defendant answers by various pleas, and answers by denying each and singular the allegations in plaintiff's petition contained, and says that the same are not true in fact, and of this it puts itself upon the country.

And further the defendant specially answers:

(1) That if the accident occurred at the time and place charged in plaintiff's petition, that same was the result of one of the risks assumed by the deceased as a locomotive engineer.

(2) That defendant at the time of this accident was engaged in interstate commerce as a common carrier, that the deceased was an engineer on a train that was engaged in interstate commerce and contained cars, passengers, baggage, mail and express which had originated at points beyond the limits of the State of Texas, and that the rights of the parties hereto are determined solely and alone by act of Congress, and that plaintiff is not entitled to predicate liability or maintain this action under any law or laws of the State of Texas.

(3) That defendant had exercised ordinary care to provide deceased with an engine that was reasonably safe for the purpose intended, and had exercised a like degree of care to furnish him with a track and roadbed that was reasonably safe, and that it had caused frequent and careful inspections to be made of the track and switch at the place of the accident, and had likewise caused frequent and careful inspections to be made of the engine that deceased was using at the time of the derailment; that such inspections had been made by competent employees who had failed to discover any defect in either the engine or the track, and that there were no defects in either of them that

could have been ascertained by the exercise of the care required by the defendant, and that the accident out of which this suit arises was not the result of any defect in the track, roadbed, switches, cross-overs, or any portion of the equipment or appliances, that all of same were in good condition.

Defendant further avers that some person intent upon mischief wantonly and wilfully interfered with and disarranged the switch and track and misplaced the switch so as to wreck a train going in the direction in which this train was going at the time of the derailment, and alleges that said switch had been tampered with as aforesaid after the hour of six o'clock p. m. on the night of the accident, and that the defendant company had no reason to suppose that the switch had been misplaced or in any way tampered with, and that neither it not any of its officers or employees knew that this switch had been thrown or partially thrown at any time after same occurred until the train was wrecked.

I give you in charge the following as the law applicable to this case:

(1) Negligence is defined to be the want of ordinary care; that is, the want of such care as an ordinarily prudent person would have exercised

under the same or similar circumstances.

(2) By proximate cause is meant an efficient cause without which the injury would not have happened and from which danger or injury might reasonably have been anticipated as a natural and probable consequence.

(3) An employee of a railroad company is held in law to assume such risks as are ordinarily incident to the service he engages to perform, and such others as he knows of or must necessarily have known of in the ordinary discharge of the duties of his service; but risks arising from the negligence of the company's servants or employees that are chargeable to it are not assumed by an employee, unless he knows of them or must necessarily have known of them in the ordinary discharge of the duties of his service.

(4) It is the duty of a railroad company to exercise ordinary care in the construction of its roadbed and switches, and to exercise ordinary care in inspecting and maintaining the same in a reasonable inspecting and maintaining the same in a reasonably safe condition for the operation of its trains and if it fails to do so and injury thereby results, the same would be negligence for which it would be liable.

(5) Ordinary care is such care as an ordinarily prudent person would have exercised under the same or similar circumstances.

(6) Now if you believe from the evidence that the plaintifff Mrs. Mary J. McGinnis, is the duly qualified administratrix of the estate of W. T. McGinnis, deceased, and was the wife of W. T. McGinnis at the date of his death, and that Lyle McGinnis, Laland McGinnis and Lamar McGinnis were their minor children, and that Nelta Saunders was their married daughter, and if you further believe from the evidence that on or about the 6th day of October, 1909, in Bell County, Texas, the said W. T. McGinnis was in the employment of the defendant as a railway engineer, and as such was engaged in running one of defendant's locomotives in the operation of one of defendant's passenger trains, and that while so employed in running said passenger train over its line of railway he ran his engine and train into a defective switch at Silenus, thereby causing the accident in question, and which resulted in the death of W. T. McGinnis; and if you further believe from the evidence that the switch point at said place had worn away, broken off and become defective, or if you find from the evidence

that said switch point had become loose or open; and if you further find from the evidence that the defendant had failed to inspect its said switch and road bed, and had failed to warn W. T. McGinnis of the dangerous condition thereof (if it was dangerous and defective at the place in question at the time above specified) and if you further find that the defendant was negligent in permitting its switch to be and remain in such defective condition (if you find it was in defective condition) and if you further find that it failed to exercise ordinary care to inspect said switch and track, and if you find that such failure, if any, was negligence as that term has heretofore been defined, and if you further find that such negligence, if any, was the direct and proximate cause of the death of W. T. McGinnis, then you will find for the plaintiff and assess the damages as hereinafter directed unless you should find for the defendant under other instructions given you in this charge.

(7) The burden is upon the plaintiff to prove by a preponderance of the evidence all of the facts necessary to make out a case for her recovery as submitted by the court in the next preceding paragraph of this charge, and unless such facts are so

established you must find for the defendants.

(8) If you find that W. T. McGinnis was killed as alleged, but that the same was the result of risks ordinarily incident to his employment and such as was assumed by him in undertaking and continuing in the employment as such engineer, you will find for the defendant and so say by your verdict.

(9) If you believe from the evidence that the switch at Silenus was displaced or injured in any manner by explosion or otherwise by some person intent upon mischief, and that the same caused the accident that resulted in the death of W. T. McGinnis, and that defendant was not negligent in failing to discover the same, then you will find for the defendant.

(10) If you find for the plaintiff then you will return a verdict in her favor as adminstratrix for such sum of money as damages as if paid in hand cash at this time would be sufficient to fairly and justly compensate the persons for whose benefit this suit is brought for such pecuniary benefits as you may believe from the evidence they had a reasonable expectation of receiving from W. T. McGinnis, if any, from and after the date of the death of

W. T. McGinnis, if his death had not been occasioned.

(11) If you find for the plaintiff, the form of your verdict will be "We the jury, find for Mrs. Mary J. McGinnis, Administratrix, the sum of———— Dollars as damages and we apportion the same as follows": You will then in your verdict apportion such amount between any or all of the persons for whose benefit this suit has been brought, stating in your verdict how much, if anything, you find for each of said persons.

If you find for the defendant you will simply so say by your verdict.

You, the jury, are the exclusive judges of the credibility of the witnesses, of the facts proved, and of the weight to be given the testimony, but you are bound to receive the law from the court which is herein given you and be governed thereby.

JOHN D. ROBINSON,
Judge of the 27th Judicial District.

Filed June 7th, 1911. E. E. Upshaw, Clerk District Court, Bell County, Texas.

The court also gave the following additional charges as requested by the Plaintiff in Error:

Dist. Court.

McGinnis

vs.

Santa Fe.

If you believe that the deceased knew that it was not usual or customary to have the switch stands, switches and track inspected under normal circumstances, in the night time, then you are charged that deceased assumed all the risk growing out of such failure to inspect, and plaintiff cannot recover because of the failure of the railroad company to so inspect.

JNO. M. FURMAN,

A. H. CULWELL,

For Def't.

Given to to be considered by you in connection with the main charge.

JOHN D. ROBINSON,

Dist. Judge.

Filed June 7th, 1911. E. E. Upshaw, Clerk District Court, Bell County, Texas.

Dist. Court.

McGinnis

vs.

Santa Fe.

You are charged that if you find from the evidence that it was not usual nor customary to inspect the switches or track in the night time and that there was no circumstances to the defendant in the exercise of ordinary care to indicate that the switch and track at place of accident should have been inspected in the night time, then the defendant would not be guilty of negligence for its failure to so inspect.

JNO. M. FURMAN,
A. H. CULWELL,
For Def't.

We request the above charge to be given also.

A. L. CURTIS &
WINBOURN PEARCE,
Attys. for Plaintiff.

Given.

JOHN D. ROBINSON,

Filed June 7th, 1911. E. E. Upshaw, District Clerk, Bell County, Texas.

In the District Court of Bell County, Texas.
No. 7577.
Mary J. McGinnis
vs.
Gulf, Colorado & Santa Fe Railway Company.

The defendant asks the court to charge the jury as follows:

You are charged that you will disregard all the allegations in plaintiff's petition setting up negligence on the part of the defendant in having allowed its flanges on the wheels of its engine to become sharp, and in allowing its switch to remain unlocked, and in allowing its rails to remain out of alignment, and allowing its engines and cars to be defective; which allegations you will disregard in considering this case, as there has been no evidence introduced bearing on any of such allegations.

TERRY, CAVIN & MILLS,
A. H. CULWELL,
JNO. M. FURMAN,
Attorneys for Defendant.

Given to be considered by the jury in consideration with the main charge.

JOHN D. ROBINSON,
Dist Judge.

Filed June 7th, 1911. E. E. Upshaw, Clerk District Court, Bell County, Texas.

In the District Court of Bell County, Texas.
No. 7577.

Mary J. McGinnis et al.

vs.

Gulf, Colorado & Santa Fe Ry. Co.

The defendant requests the court to charge the jury as follows:

You are charged that the employee assumes all the risks ordinarily incident to the business in which he is engaged, and if you find that the death of W. T. McGinnis was caused by one of the risks ordinarily incident to the running of locomotive engines, and was not the result of any want of ordinary care on the part of the defendant in providing and maintaining reasonably safe tracks and switches for the running of its trains, then if you so find, you will find for the defendant.

TERRY, CAVIN & MILLS,
A. H. CULWELL,
JNO. M. FURMAN,
Attorneys for Defendant.

Given to be considered by you in connection with the main charge.

JOHN D. ROBINSON,
Dist. Judge.

Filed [illegible]e 7th, 1911. E. E. Upshaw, District Clerk, Bell County, Texas.

In the District Court of Bell County, Texas.

No. 7577.

Mary J. McGinnis et al.

vs.

Gulf, Colorado & Santa Fe Ry. Co.

The defendant asks the court to give the following special charge to the jury:

You are charged that the railway company is in no case an insurer of the safety of its employes, and if you find from the evidence that at the point of the accident the defendant company provided and maintained reasonably safe tracks and switches for the purpose of conducting its business in operating its freight and passenger trains, and that the accident was solely the result of an injury to the switch caused by some evil-minded person, and not through any want of ordinary care on the part of the defendant, then if you so find, you will find for the defendant.

TERRY, CAVIN & MILLS,
A. H. CULWELL,
JNO. M. FURMAN,
Attorneys for Defendant.

Given to be considered by the jury in connection

with the main charge.

JOHN D. ROBINSON,

Dist. Judge.

Filed June 7th, 1911. E. E. Upshaw, Clerk District Court, Bell County, Texas.

In District Court, Bell County, June Term, 1911.

No. 7577.

Mary J. McGinnis et al.

vs.

G., C. & S. F. Ry. Co.

Special Charge No. 9.

The defendant requests the court to charge the jury:

Should you find for the plaintiff you should limit the amount you may assess as damages to such sum as if paid in cash, in hand at this time, would fairly and justly compensate plaintiff for the pecuniary loss you may find from the evidence (if any) that she has sustained as the direct and proximate result of the death of W. T. McGinnis, her husband.

And you cannot and must not consider as a basis for damages, or as any item therein, any loss of companionship, or mental anguish, or grief or suffering, she may have been occasioned by his said death.

TERRY, CAVIN & MILLS,
A. H. CULWELL,
JNO. M. FURMAN,
Att'ys. for Def't.

Given to be considered by the jury in connection with the main charge.

JOHN D. ROBINSON,
Dist. Judge.

Filed June 7th, 1911. E. E. Upshaw, Clerk District Court, Bell County, Texas.

The jury returned its verdict as follows:

"We, the jury, find for Mrs. Mary J. McGinnis, Administratrix, the sum of Fifteen Thousand ($15,000) Dollars as damages and we apportion the same as follows: To Mrs. Mary J. McGinnis Seven Thousand and five hundred $7500.00, Seven Thousand five hundred $7500.00 dollars to be equally divided among the four children.

"JOE B. FERGUSON, Foreman."

(Record, pages 6 to 14, inclusive.)

On appeal to the Court of Civil Appeals for the Third Supreme Judicial District of the State of Texas judgment of the District Court of Bell County was affirmed, and the following opinion was rendered by the Court:

Proceedings in Court of Civil Appeals.

No. 4986.

Gulf, Colorado & Santa Fe Ry. Co., Appellant,

vs.

Mary J. McGinnis et al., Appellees.

Appeal from the District Court of Bell County.

Opinion.

W. T. McGinnis, a locomotive engineer, while in the discharge of his duty operating an engine drawing a south-bound fast passenger train out of Temple on the appellant's road on the night of October 6th, 1909, was fatally injured at Silenus on account of a derailment, and this suit was brought by Mrs. Mary J. McGinnis as administratrix of his estate, for the benefit of herself as surviving wife, and also for the benefit of his four children, three of whom were minors and one a married daughter, Mrs. Nelta Saunders, alleging that said derailment occurred on account of a defective switch, which appellant had negligently failed to inspect and warn deceased of.

Defendant answered by general demurrer, general denial and specially that at the time of the accident it was engaged in interstate commerce, and that the deceased, as its engineer, was likewise so engaged,

which facts were plead in bar of plaintiff's right to recover, on the ground that said suit could not be maintained under the laws of this State. It likewise plead assumed risk, and further denied plaintiff's right to recover on the ground that it exercised reasonable care to keep its roadbed and switch in a reasonable safe condition, and had made frequent inspection of same, and that this accident was not the result of negligence on its part; that the same occurred in the night when it was not usual or customary to inspect the track; that the track and switch were in good condition because the switch had been misplaced by some evilly pisposed person intent upon mischief.

A jury trial resulted in a verdict and judgment in behalf of plaintiff in the sum of $15,000, which was apportioned by the jury awarding to Mrs. McGinnis as surviving wife the sum of $7,500, and dividing the balance equally among said four children.

Briefly stated, the facts disclose that plaintiff's decedent was the engineer in charge of appellant's southbound passenger train out of Temple on the night of October 5th, 1909, which was derailed at Silenus about 2 o'clock on the morning of the 6th, the engine and tender being thrown from the track

on account whereof he received serious injuries, from which he died. It seems that the train was making some sixty miles an hour at the time of the accident, and that the switch light was so set as to indicate a clear main line track, but the switch was partly open and its points worn and defective, on account of which, in railroad parlance, the engine "split the switch," causing the wreck. It further appeared that the pitman rod or bridle rod was disconnected with the switch stand, and that the lug which fastened or held the same was misplaced. In support of the contention that the switch had been tampered with, evidence was offered to the effect that about dusk of the evening before a loud report or explosion was heard in the neighborhood of this switch, and that an inspection of the switch and switch-stand shortly after the accident showed discolorations, as though some explosive, such as dynamite, powder or nitro-glycerin had been recently discharged thereon. There was no evidence, however, showing that the ground or earth had been disturbed in or about the switch and ties, or any holes torn in the earth, such as would likely have been made by dynamite or other like explosive. The lug spoken of was shown to have been picked up some 240 feet from the track.

Controverting this theory there was evidence on the part of plaintiff by persons who had also examined the switch and stand immediately after the accident, to the effect that there was no such discoloration as claimed by witnesses for defendant; and further that the pitman or bridle rod was bent, which indicated that this was occasioned by the force of the wreck, rather than the cause of it, and that it would not likely have been bent if it had been misplaced prior to the wreck. On the issue as to whether the defendant was guilty of negligence in not inspecting its track and apprising decedent of his danger, evidence was offered showing that about 5:30 o'clock on the afternoon of the day before the accident, that both a handcar and a freight train had passed over this switch in safety. It was also shown that it was not the custom of appellant nor of any other road in this state, to inspect its track or switches in the night time, unless on account of some sudden emergency, such as a storm, which fact was generally known to its employes. No affirmative evidence was offered, however, showing that deceased knew of such custom; but if there had been any tampering with the switch, by explosion, as claimed, this must have occurred about 6 o'clock p. m. which was a per-

iod of some eight hours before the accident, during which time it was not shown that any effort had been made to inspect or look after this switch or track. It was further shown on the part of plaintiff by several persons who examined the switch that it was slightly open, estimated to be from three-fourths to half an inch, and that the switch points appeared to have been gradually worn off some ten or twelve inches back; that this wearing away seemed to be old, as evidenced by the rust thereon, and that such conditions would occasion a wreck, by causing the engine to "split" the switch. We have only undertaken to give the salient points of the evidence on the issues thus presented, there being a mass of it on all phases of the case.

It is conceded that this suit was brought under and by virtue of the Federal Employers' Liability Act of April 22nd, 1908, 35 Sta. 65 Chap. 149, which was amended April 5th, 1910, 36 Stat. 291, Ch. 143, which provides that suit to recover damages based thereon must be brought by the personal representatives of the deceased for the use and benefit of the surviving wife and children of the deceased, or the other beneficiaries, in the absence of such next of kin; for which reason we think there is no merit in

appellant's contention to the effect that the statement in the petition that the suit was brought by Mrs. Mary J. McGinnis as administratrix of the estate of W. T. McGinnis, deceased, for the use and benefit of herself as surviving wife, &c, showed that it was brought in a dual capacity; nor do we think that the statements therein as to whose benefit it was brought were improper and should be stricken out, as contended by appellant, because we believe that under this statute such allegations were certainly proper, if not necessary.

Nor do we think the court erred in refusing to give appellant special charge urging that since the proof showed that Mrs. Nelta Saunders was a married woman, and failed to show that she had any expectation of pecuniary assistance from her father, that she was therefore not entitled to recover damages on account of his death; because said statute expressly authorized the suit to be brought by the personal representative for the benefit of the surviving wife and children of the deceased, irrespective of whether they were dependent upon him, or had the right to expect any pecuniary assistance from him.

By its 5th assignment, appellant asserts that the

court erred in refusing to give the following special charge: "The jury is charged that if you believe that the accident was occasioned by the malicious interference with the switch stand by some evilly disposed person in the night time of the night on which the accident occurred, then your verdict should be for the defendant, unless you further find that the defeandant knew of such interference, or knew such facts in regard thereto as would put a person of ordinary prudence on inquiry"; insisting by its proposition that the defendant was entitled to an affirmative charge presenting this defense. We think, in the absence of a charge upon this subject, that its refusal would have been an error; but the court in its main charge instructed the jury that "If you believe from the evidence that the switch at Silenus was misplaced or injured in any manner by explosions or otherwise, by some person intent upon mischief, and that the same caused the accident that resulted in the death of W. T. McGinnis, and that defendant was not negligent in failing to discover the same, then you will find for the defendant." Besides this, the court gave the following special charges, covering this phase of the case: "Special charge No. 8: You are charged that the rail-

way company is in no case the insurer of the safety of its employes; and if you find from the evidence that at the point of the accident the defendant company provided and maintained reasonably safe tracks and switches for the purpose of conducting its business in operating its freight and passenger trains, and that the accident was solely the result of an injury to the switch, caused by some evil minded person, and not through any want of ordinary care on the part of the defendant, then if you so find, you will find for the defendant." Special charge No. 5: "You are charged that if you believe from the evidence that it was not usual or customary to inspect the switches or track in the night time, and that there was no circumstance known to the defendant in the exercise of ordinary care to indicate that the switch and track at the place of the accident should be inspected then you are charged that the defendant would not be guilty of negligence for its failure to so inspect." Special Charge No. 4: "If you believe that the deceased knew that it was not usual nor customary to have the switch-stand, switches and tracks inspected under normal circumstances in the night time, then you are charged that the deceased assumed all the risks growing out of

such failure of the railroad company to so inspect." It seems to us that these charges, together with the main charge, fully, clearly and fairly presented this feature of appellant's defense, for which reason the court properly refused to give the special charge requested.

The tenth assignment complains that the court erred in giving the 6th paragraph of its charge to the jury, which is as follows: "Now if you believe from the evidence that the plaintiff Mrs. Mary J. McGinnis, is the duly qualified administratrix of the estate of W. T. McGinnis, deceased, and was the wife of W. T. McGinnis at the date of his death, and that Lyle McGinnis, Laland McGinnis and Lamar McGinnis were their minor children, and that Nelta Saunders was their married daughter, and if you further believe from the evidence that on or about the 6th day of October, 1909, in Bell County, Texas, the said W. T. McGinnis was in the employment of the defendant as a railway engineer, and as such was engaged in running one of the defendant's locomotives in the operation of one of defendant's passenger trains, and that while so employed in running said passenger train over its line of railway he ran his engine and train into a defective switch at Silenus,

thereby causing the accident in question, and which resulted in the death of W. T. McGinnis; and you further believe from the evidence that the switchpoint at said place had worn away, broken off and became defective, or, if you find from the evidence that said switch had become loose or open; and if you further find from the evidence that the defendant had failed to inspect its said switch and road bed, and had failed to warn W. T. McGinnis of the dangerous condition thereof (if it was dangerous and defective at the place in question at the time above specified) and if you further find that the defendant was negligent in permitting its switch to be and remain in such defective condition (if you find it was in a defective condition) and if you further find that it failed to exercise ordinary care to inspect said switch and track, and if you find that such failure, if any, was negligence as that term has been heretofore defined, and you further find that such negligence, if any, was the direct and proximate cause of the death of W. T. McGinnis, then you will find for the plaintiff and assess the damages as hereinafter directed, unless you should find for the defendant under other instructions given you in this charge."

By the first proposition thereunder it is insisted

that the same imposed too great a burden upon the defendant, in that, under said charge a verdict was warranted against it if the jury should find that the cause thereof, claiming that since it was not an switch was loose, or open, without regard to the insurer, its only obligation was to exercise ordinary care to see that the same was in a reasonably safe condition. Second. Because there was no evidence to sustain or warrant the submission o fthe issue as to the failure of the defendant to inspect the track; and, third, that the mere fact that the switchpoint had become defective was not sufficient to render the defendant liable, because such defect, if any in and of itself was not negligence to deceased, and in order to make the same actionable it was necessary to show that the defect existed for such length of time as that the same should have been discovered by reasonable inspection.

Appellee contends that this charge is not subject to the criticism offered; that the jury were not authorized to find a verdict against the defendant merely because the switch was defective, unless they further found that defendant failed to inspect and was guilty of negligence; and that the same was the direct and proximate cause of the death of the de-

ceased;. contending that the evidence established that the switch had been defective for a long time, as was apparent from the condition of the switch points.

We think appellee is correct in this respect. The charge does not authorize a recovery on the ground that the jury should merely find that there was a defect, unless they further found that the defendant had failed to inspect and was guilty of negligence in so failing, and that this was the proximate cause of the injury. It is true that the burden of proof rested upon the appellees to show negligence, before they were entitled to recover; but in the instant case it will be recalled that the proof did show a derailment; and that the same was occasioned by a defective switch. This being true, it then devolved upon the defendant to show that it was not guilty of negligence in this respect. This could be done by showing that they had exercised ordinary care to inspect the switch, and keep the same in proper condition, but, notwithstanding this, some outsider had so interfered with the same as to cause the accident. In the present case they sought to show that the track was tampered with. This issue was submitted to the jury under proper instructions; and the court

likewise in the charge above outlined, permitted a recovery on the part of plaintiff, notwithstanding the switch had been tampered with, provided the jury believed from the evidence that there was a failure on the part of the defendant to exercise ordinary care to inspect the track and protect the plaintiff's decedent from danger. The mere fact that it was not customary on the part of defendant and other railways, to inspect their tracks at night, it seems to us could not be regarded by the court sufficient, as matter of law, to discharge this burden; but the issue remained one of fact for the determination of the jury under appropriate instructions. In I. & G. N. R. R. Co, vs. Johnson, 55 S. W. 772, where a brakeman was killed by the derailment of a train at a defective switch near Austin, plaintiff alleged the failure to exercise the proper care by inspection, for the discovery of the defect. The defendant in that case, as in this, claimed that the track and switch at the place of the accident had been tampered with, and that it had exercised due care, and therefore was not responsible. Mr. Chief Justice Key, the Associate Justice, delivering the opinion of the court, said: "While the burden of proving negligence on the part of appellant rested

upon appellees, when it was developed by the testimony that the derailment and wreck which resulted in the death of Johnson were caused by an open switch, and that he himself was not at fault, these facts were sufficient to justify a finding of negligence against the appellant, unless it submitted testimony explaining how the switch came to be open, or at least showing that it had exercised proper care to keep the switch and track at that place in safe condition." Citing McCreary vs. Railway, 89 Tex., 168; Washington vs. Railway, 90 Tex., 31. Proceeding, the court says: "But leaving out of the case the case of the switch rod breaking on account of ordinary wear and tear, and conceding that the switch was interfered with and opened by some outside person, for whose conduct appellant was not responsible, still, it was liable if the testimony fails to show that it exercised proper care and diligence to discover the state of the switch and warn the freight train of the danger. The testimony fails to show any effort by appellant during the six hours intervening between the time Power's engine passed the switch and the time of the wreck, to ascertain the condition of the switch and track at that point."

In the case of Texas Mexican Railway Co. vs.

Mendez, 78 S. W., 25, the train came to a bridge about four o'clock in the morning of May 1st, 1902, and the bridge having been consumed by fire, and the fire having gone completely out, leaving the rails thereon without support, the train was precipitated and plaintiff injured. Plaintiff testified that it was the custom of the section gang to go over and examine their section in the day, but he never saw them do so at night, and did not know whether they did so at night. A train had passed safely over the track the afternoon before. The court said: "As other known conditions to some extent existed, in which a fire could originate, the courts cannot arbitrarily say with what frequency inspections ought to have been carried on in order to constitute ordinary care. It is unquestionably of the greatest importance for a railway company to be careful in protecting its employes as well as its passengers through inspection of its road. It will not do, as a matter of law, to say that it may send an inspector over its section, and abstain from giving it any attention whatever for a considerable time, simply because no necessity is apparent for it. We apprehend that the origin of defect might be so recent and the circumstances such that the court could say that the company had

not been negligent in not discovering it in time to prevent the particular accident. But as we have no statute prescribing the railway company's duty as to the frequency of inspection, the question is generally and necessarily one for the jury to determine."

In Thompson vs. G., H. & S. A. Ry. Co., 106 S. W., 912, it is said: "How often inspections of the railroad track must be made depends upon its location, the surrounding country, the character of population ,and other circumstances; and, in view of the diversified facts surrounding each case, the sufficiency of such inspection is peculiarly a question of fact for the jury. This rule would not be changed by the fact that the defect in the track was caused by criminals, because the same duty to discover defects would prevail in that case as in the case of defects from any other cause. The duty to exercise at least ordinary care in detecting the defect in the track devolved upon the appellee, regardless of what may have caused the defect; and the question of whether appellee exercised such care was one of fact for the jury. We do not know when the displacement of the rail that derailed the engine took place, only that it occurred some time prior to the death

of Thompson; and it was not for the trial judge to determine that the inspection and watch over the track was sufficient, even though the time of the displacement had been shown, unless it had been such a short interval between the displacement and the accident as to preclude the idea that it could have been discovered by appellee. When it is proved that Thompson was killed through the derailment of his engine by reason of the defect in the track of appellee's railway, appellants had made out a prima facie case of negligence on the part of appellee, and the burden rested upon it to show that the defect in the track had been caused by the unlawful acts of trespassers, and that it had not been negligent in failing to discover the same. Appellee, and not appellants, should have established the fact of such careful inspection as the place and circumstances demanded, and a failure to fix a time proximately when the trespassers did their work is chargeable to appellee, and not appellant. The rule is thus stated in the case of Marcom vs. Railway, 126 N. C. 200, 35 S. E. 423, by the supreme court of North Carolina, in a suit for damages for the death of a fireman, which occurred through a derailment: "It is the duty of every railroad company to provide and

maintain a safe roadbed, and its negligent failure to do is negligence per se. That while the company is held to a very high degree of care, there must in all cases be some element of negligence to justify recovery, and it cannot be held responsible for the wanton and malicious acts of an outsider, unless it could, by the exercise of reasonable diligence have places upon the company the positive duty of providing a safe track, including the incidental duties prevented the consequences of such act. As the law of inspection and repair, its unsafe condition, whether admitted or proved, of itself raises the presumption of negligence. This is always the case where there is a positive duty imposed by law. The burden of proving such a failure of duty rests upon the plaintiff, but when the fact is proved or admitted, the burden of proving all such facts as are relied upon by the defendant to excuse this failure, rests upon the defendant. Its contention that the accident was caused by someone for whom it was not responsible, and the consequences of whose act it could not have prevented by any reasonable degree of care was an affirmative defense by its very nature carrying with it the burden of proof." Citing in support of the doctrine Railway Co. vs. Gaither, 43 S. W.,

266; Williams vs. Lumber Company, 114 La., 805, 38 So., 567; Ry. Co. vs. Kane, 92 Ga., 187, 18 S. E., 18, 22 L. R. A., 315. See also Ry. Co. vs. Brandt, 122 S. W., 59; Ry. Co. vs. Sandlin, 122 S. W., 62.

The 12th assignment complains that the court erred n failing to give appellant's special charge defining ordinary care. This charge, we think, was properly refused, (1) because the court had given a correct charge upon the subject; and (2) because the charge was argumentative and upon the weight of evidence.

The remaining assignments, in various respects, assail the evidence as being insufficient to sustain the verdict. We have carefully considered the entire record, in connection with these several assignments; and while there is some evidence tending to show that the switch had been interfered with, and that some care had been exercised for the protection of the track, still, as there was a conflict in the evidence as to both of these issues, we are not inclined to disturb the judgment on this ground, since under appropriate instructions the jury have passed upon these issues; and the trial court, who was in better position than we are to determine the truth or falsity of the evidence to sustain or defeat the respective

contentions, has declined to interfere therewith.

Finding no error in the proceedings of the trial court which will justify us in setting aside its judgment, the same is in all things affirmed.

Affirmed.

B. H. RICE,
Associate Justice.

Filed April 24th, 1912.

(Endorsed:) With App. No. 7828. No. 4968. G., C. & S. F. Ry. Co., Appellant, vs. Mary J. McGinnis et al., Appellees. Appeal from Bell County. Opinion. Affirmed. Filed in Court of Civial Appeals, Third Supreme Judicial District, Austin, Texas, Apr. 24, 1912. R. H. Connerly, Clerk.

* * * * * * * *

Writ of Error to the Supreme Court of the State of Texas was refused, and Plaintiff in Error has filed the following application for Writ of Error in this court:

(Record, page 301.)

Gulf, Colorado and Santa Fe Railway Company,
Plaintiff in Error,

vs.

Mary J. McGinnis, Administratrix,
Defendant in Error.

Petition for Allowance of Writ of Error.

To the Honorable Supreme Court of the United States:

Comes the Gulf, Colorado and Santa Fe Railway Company by its Attorneys, J. W. Terry, A. B. Browne and A. H. Culwell, and complains that in the records and proceedings and also in the rendition of a judgment in a suit between the Gulf, Colorado and Santa Fe Railway Company, Appellant, and Mary J. McGinnis, Administratix, Appellee, in the said Court of Civil Appeals for the Third Supreme Judicial District of Texas, being the highest Court of law or equity in said State in which a decision was rendered in said suit, the Supreme Court of Texas having denied to said Appellant its application for a writ of error presented therein and the said Court of Civil Appeals for the Third Supreme Judicial District of Texas being the Court which had the final custody of the record in said cause, and in which a final judgment was rendered against the said Appellant on the 24th day of April, 1912, and in which Plaintiff in Error's motion for a rehearing was overruled by said Court on the 15th day of May, 1912, wherein there was drawn in question the validity of a statute of the State of Texas under the facts of this case on the ground of its being repugnant to

the laws of the United States on the same question and the decision was in favor of such, the validity of said statute, as same applied to the facts of this case, the same being known as Chapter 163, 29th Legislature of the State of Texas and being "An Act to prescribe when the defense of assumed risk by a person, corporation or receiver operating a railroad or street railway in any suit for damages for the death or personal injury of an employee, and declaring an emergency," said Act approved April 24th, 1905, in conjunction with the further act of the Legislature of the State of Texas, same being Chapter 10, First Called Session of the 31st Legislature, and being "An Act declaring corporations, receivers, and other persons operating railroads in this State, to be liable to employes for injuries received through the negligence of such employer, officer, agent or servant, or in case of death from such injury, to be liable to the surviving widow and children, or husband and children and mother and father of the deceased; and if none, then to the next of kin dependent upon such employes; prescribing the effect of contributory negligence and assumed risk upon the right of recovery; declaring void any contract, rule or regulation intended to

enable the employer to limit liability; also providing that employer shall be entitled to set off against any claim any sum contributed by such employee to a fund provided for such cases and which was actually paid to the injured party, and exempting such recovery from the debts of the deceased, and providing that the recovery shall be apportioned by the jury, or court trying the case without a jury, among those entitled to recover; providing how and by whom suit may be brought, also that nothing in this Act shall impair any right under any other law of this State or of the United States or in any way interfere with any proceeding now pending in any court, and declaring an emergency," and wherein is drawn in question a right, privilege and immunity claimed under a statute of the United States, same being "An Act relating to the liability of common carriers by railroad to their employes in certain case," approved April 22nd, 1908, and being 35 Stat., Ch. 149, Laws of the United States and the decision of the Court of Civil Appeals is and was against the right and privilege especially set up and claimed by Plaintiff in Error herein, it appearing without controversy that at the time of the accident out of which this suit arose deceased was killed while he

was employed by Plaintiff in Error engaging in commerce between the State of Texas and other states of the United States, and that deceased was an employee handling such interstate commerce at the time of his death, and it being claimed by said Plaintiff in Error that under the Act of Congress above and under the facts of this case the deceased, W. T. McGinnis, assumed the risk of the injuries which resulted in his death, and that under the Act of Congress, as above set up, the Defendant in Error herein has no cause of action against your petitioner, and that under the facts of this case in no event was the married daughter of the deceased entitled to recovery, and its exemption from liability under the terms of the Act of Congress, above mentioned, having been fully set up in the said Court of Civil Appeals and the said Court of Civil Appeals having denied to it the exemption from liability under said Act, as herein asserted, and your petitioner alleging, as it does, that the cause of action, if any, existing in favor of the Defendant in Error, is one arising alone and exclusively under and by virtue of an act of Congress, which act of Congress is the one above specified, all of which appears from the record and proceedings in the said suit; manifest

error hath happened to the great damage of the Gulf, Colorado and Santa Fe Railway Company;

Wherefore the said Gulf, Colorado and Santa Fe Railway Company, by its Attorneys, prays for the allowance of writ of error and such other process as may cause the same to be corrected by the Supreme Court o fthe United States.

J. W. TERRY,
A. B. BROWNE,
A. H. CULWELL,

Attorneys for Gulf, Colorado and Santa Fe Railway Company, Plaintiff in Error.

Allowed by: JOSEPH R. LAMAR,

Associate Justice of the Supreme Court of the United States.

Endorsed: Gulf, Colorado and Santa Fe Ry. Co., Plaintiff in Error, vs. Mary J. McGinnis, Adm'x, Defendant in Error. Filed in Court of Civil Appeals 3rd Supreme Judicial District, Austin, Texas. Aug. 14, 1912. R. H. Connerly, Clerk.

And has also filed in this court the following as its Assignments of Error:

(Record, page 304.)

In the Court of Civil Appeals for the Third Supreme Judicial District of Texas.

Gulf, Colorado and Santa Fe Railway Company,
Plaintiff in Error,

vs.

Mary J. McGinnis, Administratrix,
Defendant in Error.

In Error from the Court of Civil Appeals of the Third Supreme Judicial District of Texas.

To the Supreme Court of the United States:

Now comes the Gulf, Colorado and Santa Fé Railway Company, Plaintiff in Error, by its Attorneys, J. W. Terry, A. B. Browne and A. H. Culwell, and says that in the record and proceedings aforesaid there is manifest error in the judgment and decision of the Court of Civil Appeals of the Third Supreme Judicial District of the State of Texas, to-wit:

First.

The Court of Civil Appeals of the Third Supreme Judicial District of the State of Texas erred in holding that the Plaintiff in Error herein was liable in damages for the death of W. T. McGinnis, and in failing to hold that the deceased assumed the risk of the injuries received by him, and of the danger thereof, under the Federal Employers' Liability Act, same being the act approved April 22,

1908, 35 Stat., 65, Ch. 149, as applied to the facts in this case.

Second.

The Court of Civil Appeals of the Third Supreme Judicial District of Texas erred in overruling and failing to sustain the Twenty-first assignment of error presented in that Court, said assignment complaining as it did of the failure of the trial court to grant it a new trial, and being as follows:

"The Court erred in failing and refusing to set aside the verdict returned herein, and in failing to give the defendant a new trial on the fifteenth ground of its amended motion therefor, which was as follows:

"The evidence shows without conflict that it was not usual or customary under normal conditions to inspect the track, switches and switch-stands in the night time; that the conditions at the time of this wreck were normal; that the switch in question was located on straight track, on level ground, in a clear country; that there had been no rainfall for some time previous to the accident which made it necessary or proper to keep track walkers doing service in the night time; that there were no usual circumstances in being, which ren-

dered it expedient for the defendant to have the switches and switch-stand inspected in the night time;that it was well known and well understood by all operatives of trains, including the deceased, that under normal conditions, the track, switches and switch-points were not and would not be inspected in the night time; that the deceased knew on the night in question, or it is fair to assume that he knew that the switch and switch-stand at the point in question had not been inspected later than 6 o'clock on the afternoon before. Under this state of the evidence, the deaceased clearly assumed all risks growing out of the failure to inspect the track, switches and switch-stand during that night.

" 'It was one of the ordinary risks of the service, well known by all engineers, and for each and all of these reasons the verdict o fthe jury is against the manifest weight and gerat preponderance of the testimony.' "

Third.

It having been admitted that this suit was maintained under the Federal Employers' Liability Act, and that the rights and liability of the parties are to be determined by that act, the Court of Civil Appeals of the Third Supreme Judicial District of

Texas erred in holding that the Plaintiff in Error was liable for failure to inspect its track and switches at night (which failure was the only theory upon which, under the evidence, the Court of Civil Appeals could have affirmed the judgment herein), and that the deceased did not assume the risk growing out o fthe failure of the Plaintiff in Error to inspect its track and switches in the night time. The Assumed Risk Statute of Texas, known as Ch. 163, 29th Legislature of the State of Texas, approved April 4, 1905, is wholly inapplicable, as under the Federal Employers' Liability Act, as applied to the facts of this case, the deceased did assume all risk growing out of the failure of the Railway Company to inspect its track and switches in the night time.

Fourth.

The Court of Civil Appeals of the Third Supreme Judicial District of Texas erred in holding that the trial court committed no error in failing and refusing to give to the jury Plaintiff in Error's Special Charge No. 10, which was as follows:

"You are charged that you cannot find any damages in favor of Nelta Saunders, alleged to be a daughter of W. T. McGinnis, because the proof shows that she is a married woman, and is supported

by her husband, X. B. Saunders, and there is no proof that she had an yexpectation of any pecuniary assistance from her said father, W. T. McGinnis, nor is there any allegation in the petition that she had any expectation of such assistance if her father had lived."

Fifth.

The Court of Civil Appeals of the Third Supreme Judicial District of Texas erred in holding that the trial court committed no error in failing and refusing to set aside the verdict returned on the ninth ground of the amended motion for a new trial, which was as follows:

"In no event should a verdict have been returned in favor of Nelta Saunders. The evidence showed that she was a married woman, who was supported by her husband, and there was no evidence showing, or tending to show, that she received any contributions from her father, or that she would likely receive such contributions in the future. Judgment, therefore, awarding her damages was without evidence to sustain it, and same should be set aside," and said Court of Civil Appeals erred in holding that under the Federal Employers' Act Plaintiff in Error would be and is liable in damages to a mar-

ried daughter of the deceased whether such daughter received contributions from the deceased, or had expectation in the future of so doing, or not.

Respectfully submitted,

J. W. TERRY,
A. B. BROWNE,
A. H. CULWELL,

Attorneys for Plaintiff in Error, Gulf, Colorado and Santa Fe Railway Company.

Endorsed: Gulf, Colorado and Santa Fe Ry. Co., Pl'ff in Error, vs. Mary J. McGinnis, Ad'mx, Def't in Error. Assignments in Error. Filed in Court of Civil Appeals 3rd Supreme Judicial District, Aug. 14, 1912. R. H. Connerly, Clerk.

(Record, pages 24 to 28, inclusive.)

* * * * * * *

ARGUMENT.

The Opinion of the Court of Civil Appeals for the Third Supreme Judicial District of the State of Texas in this cause contains an accurate and full statement of the issues involved, and all the controlling facts and an extended review of the authorities.

1

Assumed Risk.

It is clear from the foregoing that this case was

maintained and that the rights and liablity of the parties were determined under the Federal Employers' Liability Act; and it is also apparent that no statute of the State of Texas was invoked by the Defendant in Error, neither was there drawn in question the validity of any statute of the State of Texas on the ground of its being repugnant to the laws of the United States, Chapter 163, 29th Legislature of the State of Texas, and being an Act to prescribe when the defense of assumed risk, should or should not be available. Neither was an Act approved April 24th, 1905, in conjunction with the further Act of the Legislature of the State of Texas, same being chapter 10, First Called Session of the 31st Legislature.

Plaintiff in Error has incorrectly stated the facts in its petition for allowance of writ of error herein, wherein it alleges that the validity of the statute of the State of Texas was drawn in question, and wherein it alleges that there was drawn in question a right, privilege and immunity, claimed under a statute of the United States, same being an Act relating to the liability of common carriers by railroad to their employes in certain cases, approved April 22nd, 1908. Neither the Federal nor the State stat-

ute modifying the common law rule as to the defense on assumed risk in certain cases was relied upon in this case. On the contrary the court gave the special charges requested by the Plaintiff in Error on the trial of this case, to the jury.

Defendant in Error's cause of action in the District Court of Bell County, Texas, was based upon the negligence of the railway company in permitting its track and switch at the point of derailment to be and remain in a dangerous condition, and in permitting its switch point to become worn away, broken off and defective, and upon its negligence in failing to discover and repair the same. It appears from the opinion of the Court of Civil Appeals that the evidence introduced by the Defendant in Error on the trial, as shown by the testimony of many witnesses, was to the effect that the switch points had been defective at the place of derailment for a long time, that the points appeared to be gradually worn off for some ten or twelve inches, that this wearing away was old as evidenced by the rust thereon, and that the condition of the switch points was such as to occasion a wreck by causing the engine to "split the switch."

Defendant in Error relied for recovery upon

the testimony offered showing a defective condition of the switch to have existed for a long time previous to the derailment. The condition shown was one that would not necessarily occasion the derailment of every train passing over the switch, but was such a defective condition as was dangerous, and might and did cause the wreck.

The Plaintiff in Error undertook to defend by denying that any defective condition had existed prior to the day of the accident in question, and offered some evidence undertaking to show that the switch at the point of derailment had been interfered with by outside parties. All of these matters were purely defensive and were submitted under appropriate instructions to the jury, as is shown by the opinion of the Court of Civil Appeals the evidence was conflicting upon all of these issues, and it would not have been proper for the court to have assumed that the defense offered by the plaintiff in error had been established as a matter of law. The jury passed upon these issues of fact against Plaintiff in Error, and the Court of Civil Appeals in considering the case also passed upon the sufficiency of the evidence to sustain the verdict, and upon the issues of fact as presented by the conflicting testi-

mony, and declined to disturb the verdict, and declined to hol das a matter of law, that the Plaintiff in Error had established the facts relied upon by it in support of its plea of assumed risk. And, on the contrary, the Court of Civil Appeals in its opinion has found that W. T. McGinnis was the engineer in charge of Appellant's southbound passenger train out of Temple on the night of October 6th, 1909, which was derailed at Silenus about two o'clock on the morning of the 6th, the engine and tender being thrown from the track, on account whereof he received injuries from which he died.

The Court also found that the train was making some sixty miles an hour at the time of the accident, and that the switch light was so set as to indicate a clear main line track, but the switch was partly open, and its points worn and defective, on account of which in railroad parlance the engine "split the switch" causing the wreck.

The Court of Civil Appeals further finds that evidence was offered by the Defendant in Error controverting the theory that the switch had been interfered with by some outside person, that the pitman or bridle rod was bent which indicated this was occasioned by the force of the wreck rather than the

cause of it, and that it would not likely have been bent if it had been misplaced prior to the time, and that while it was not the custom of the plaintiff in error nor o fother roads in the State of Texas to inspect thei rswitches or track in the night time unless on account of some sudden emergency, such as a storm, which fact was generally known to its employes, that no affirmative evidence was offered showing that the deceased knew of such custom.

The Court of Civil Appeals also found that while there was some evidence tending to show that the switch had been interfered with, and that some care had been exercised for the protection of the track, still, as there was a conflict in the evidence as to both of these issues it would not disturb the judgment on that ground, since under appropriate instructions the jury had passed upon these issues.

The court gave the plaintiff in error benefit of charges covering every phase of its defense on assumed risk, including the special instructions requested by itself. It was only entitled to have the issue of assumed risk submitted to the jury, if at all, in connection with the defense offered wherein it contended that its track had been interfered with by some outside person about eight hours before the

wreck. And the court under appropriate instructions including the requested charges asked for by the plaintiff in error, fairly and fully presented this matter to the jury. Under the charges given, the jury must have found that there was no outside interference. The jury were instructed by the court that if deceased knew it was not usual nor customary to have the switch stands, switches, and track inspected under normal circumstances in the night time, then that the deceased assumed all of the risk growing out of such failure to so inspect and plaintiff could not recover because of the failure of the railroad company to so inspect. The jury were further instructed that if they found from the evidence that it was not usual or customary to inspect the switches or track in the night time, and that there was no circumstances to the defendant, in the exercise of ordinary care to indicate that the switch and track at the place of accident should have been inspected in the night time, then the defendant would not be guilty of negligence for its failure to so inspect.

The jury was further instructed that the employee assumes all risks ordinarily incident to the business in which he is engaged, and that if it should

believe that the death of W. T. McGinnis was caused by one of the risks ordinarily incident to the running of locomotive engines, and was not the result of any want of ordinary care on the part of the defendant in providing and maintaining reasonably safe tracks and switches for the running of its trains, then it should find for the defendant; and the jury was also instructed that the railway company is in no case an insurer of the safety of its employes, and that if it should find from the evidence that at the point of the accident the defendant company had provided and maintained reasonably safe tracks, and switches, for the purpose of conducting its business in operating its freight and passenger trains, and that the accident was solely the result of an injury to the switch caused by some evil minded person, and not through any want of ordinary care on the part of the defendant, then it should find for the defendant.

While the issue of assumed risk was fully presented to the jury we are inclined to the opinion that the pleadings in this case do not present the issue of assumed risk at all, and we believe that the charges given were more favorable than the plaintiff in error was entitled to, and would have been ob-

jectoinable as to the defendant in error.

Taking all of the court's charges together, the jury could not have found for defendant in error if it had found that the track and switch had been tampered with on the evening before the wreck, and we believe the court committed error against the defendant in error in so charging. It was not plead by plaintiff in error, nor was it contended by it, that the deceased, W. T. McGinnis, had any knowledge of the defective condition of the switch at Silenus. It only plead that he knew of the custom of the railway company not to inspect its switches at night. The deceased was not connected with the work of inspecting switches, therefore he did not assume the risk of injury from the negligent method by which plaintiff in error did its inspecting. The employee does not assume the risks of dangers growing out of the master's negligence or the negligence of those for whom the master is responsible. The railroad company owes the duty to its trainmen in charge of its trains to furnish them with a safe track and roadbed over which to run its trains. This is an absolute duty and cannot be evaded by adopting a negligent system or method of inspection because its trainmen are not required to take notice of the

master's method of inspection. The work of inspection is one with which the train men are in no way connected. The doctrine that one takes the risks growing out of the method of conducting the work does not apply in this case. It is not contended that W. T. McGinnis had any knowledge whatever of the defective condition of the switch at Silenus, and he did not assume any risk growing out of the negligence of the railway company in its failure to inspect. In T. & P. Railway Company vs. Archibald, 170 U. S. Sup. Court, page 665, Mr. Justice White, delivering the opinion of the Court used the following language: "The employer,, on the one hand may rely on the fact that his employee assumes the risks usually incident to the employment. The employee, on the other, has the right to rest on the assumption that appliances furnished are free from defects discoverable by proper inspection, and is not submitted to the danger of using appliances containing such defects because of his knowledge of the general methods adopted by the employer in carrying on his business, or because by ordinary care he might have known of the methods, and inferred therefrom that danger of unsafe appliances might arise. The employee is not compelled to pass judg-

ment on the employer's methods of business or to conclude as to their adequacy. He has a right to assume that the employer will use reasonable care to make the appliances safe and to deal with those furnished relying on this fact, subject, of course, to the exception which we have already stated, by which where an appliance is furnished an employee, in which there exists a defect known to him or plainly observable by him, he cannot recover for injury caused by such defective appliance, if, with the knowledge above stated, he negligently continues to use it. In assuming the risks of the particular service in which he engages the employee may legally assume that the employer, by whatever rule he elects to conduct his business, will fulfill his legal duty by making reasonable efforts to furnish appliances reasonably safe for the purposes for which they are intended; and while this does not justify an employee in using an appliance which he knows to be defective, or relieve him from observing patent defects therein, it obviously does not compel him to know or investigate the employer's modes of business, under the penalty, if he does not do so, of taking the risk of the employer's fault in furnishing him unsafe appliances. Those risks not obvious as-

sumed by the employee are such perils as exist after the master has used due care and precaution to guard the former against danger. And the defective condition of structures and appliances which, by the exercise of reasonable care of the master, may be obviated, and from the consequences of which he is relieved from responsibility to the servant by reason of the latter's knowledge of the situation, is such as is apparent to his observation. Without now considering the question whether the rule in this respect charges an employe with knowledge of defects, except with regard to such appliances or instruments as he is engaged himself in using, we think it sufficient to say that the law does not, under any circumstances, exact of him the use of diligence in ascertaining such defects, but charges him with knowledge of such only as are open to his observation. Beyond that he has the right to presume, without inquiry or investigation, that his employer has discharged his duty of furnishing him with safe and proper instruments and appliances. Indeed, the ultimate result of the argument of the plaintiff in error is to entirely absolve the employer from the duty of endeavoring to supply safe appliances, since it subjects an employee to all risks arising from un-

safe ones, if the business be carried on by the employer without reasonable care, and the employee knew, or by diligence could have known, not of the damages incident to the business, but of the harm possibly to result from the employer's neglectful methods. Measured by the principles just stated the trial court not only did not err in striking out parts of the instructions which were asked, but in the portions given stated the law to the jury more favorably to the plaintiff in error than was sanctioned by true legal principles."

In H. & T. C. Ry. Co. v. Turner, 99 Tex., 554, an employee was injured while attempting to couple a car loaded with timbers which projected beyond the car, being caught between the engine and a projecting piece of timber. The railway company contended that because these cars were loaded in the usual manner, although negligently done, the employee assumed the risk of such negligence. The Supreme Court quoted very briefly the case of Hamilton vs. Railway Company, in which the following language was used relating to a requested instruction: "The instruction was properly refused for the obvious reason that habits of negligence on the part of defendant or other railroads, will not relieve

them from the consequence of their negligent acts. It can hardly be insisted that, if one is 'usually and commonly' negligent, he will escape liability for his acts, and that the usual and common delinquencies of others will have the effect to excuse him. If, because an act is usual and common, it ceases to be negligent, it follows that the sure way of escaping liability for injuries to persons and property, in cases of this character, would be to adopt a certain and uniform system of common negligence."

However, the court below took the opposite view and gave the plaintiff in error the full benefit of charges presenting the issue of assumed risk on every possible phase of the case as presented by its pleadings and as urged by it in special charges requested.

II.

The Apportionment of Damages.

Under the Federal Employer's Liability Act it is provided that causes of action arising thereunder should be brought by the personal representative for the benefit of the surviving wife and children of the deceased. Judgment in such case is properly rendered for the personal representative and no apportionment is required. An instruction of the court to

apportion in such a case is not necessary, and said apportionment being unnecessary and not required, is surplusage, and the same is entirely harmless and plaintiff in error cannot complain.

In Railway Company vs. Mary Agnes Walsh, Administratrix, the same being one of the Employer's Liability cases decided by this court at its last term, judgment was affirmed, wherein the recovery was for Mary Agnes Walsh as Administratrix, and without any apportionment.

Mrs. Nelta Saunders was the daughter of W. T. McGinnis. As such she had the right to expect contributions from her father if necessary during his lifetime, and upon his death, as his heir, she would have shared equally with the other children in the distribution of his property and all his savings. Plaintiff in error cannot complain that the jury set apart a small portion of the recovery for Mrs. Saunders. The apportionment made by the jury was the same as would have been made by the laws of the State of Texas, as one-half of the recovery was awarded to the surviving wife, and the remainder was divided equally among the children. This is in direct accord with the statutes of the State of Texas on the Laws of Descent and Distribution; however,

if no apportionment was necessary and if it were not proper to make such apportionment as is made of other estates, under the laws of Descent and Distribution, yet ,at least, plaintiff in error has no right to complain, and if such right should exist it would be at the instance only of the other persons for whose benefit this suit was brought.

Conclusion.

From the record it is apparent that the motion to dismiss should be granted. The validity of no statute, either state or federal, is drawn in question. Neither the State nor Federal Acts relating to assumed risk were invoked by defendant in error.

The foregoing record makes it clear that there was not drawn in question the validity of any treaty or statute of, or any authority exercised under the United States; nor was there drawn in question the validity of a statute of, or an authority exercised under any State on the ground of their being repugnant to the Constitution, treaties or laws of the United States, nor was any right, privilege or immunity claimed under the Constitution or any statute of the United States.

This cause was tried under the common law rule of assumed risk, and, as we think, the issue of as-

sumed risk was presented more favorably to the plaintiff in error than it was entitled to, the same being presented according to the requested charges of the plaintiff in error, although in our opinion the issue of assumed risk was not in the case.

Judgment was in favor of Mary J. McGinnis, Administratrix of the estate of W. T. McGinnis, deceased, and while an apportionment was made it was the same apportionment as the laws of the State of Texas would have made in distributing the estate, and the same was at least harmless.

We respectfuly submit that it is obvious that on the record the motion to dismiss should be granted because it is apparent that the grounds for the writ as alleged in Plaintiff in Error's application do not exist.

We therefore pray that the writ be dismissed and that defendant in error be allowed costs and a penalty of ten per cent on the judgment of the court below because of the unnecessary delay occasioned herein.

In the event defendant in error is not entitled to a dismissal of the writ, then we ask that the motion to affirm be granted because the same was obtained for delay, only, and the questions on which

the decision of the case depends are so frivolous as not to require further argument, and in this event we also pray for such damages and costs.

WINBOURN PEARCE,
A. L. CURTIS,
Attorneys for Defendant in Error.

—In the —

Supreme Court of the United States

October Term, 1912.

No. 762.

GULF, COLORADO & SANTA FE RAILWAY COMPANY,
Plaintiff in Error,

vs.

MARY J. McGINNIS, Administratrix of the Estate of W. T. McGINNIS, Deceased,
Defendant in Error.

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Defendant in Error.

ARGUMENT FOR DEFENDANT IN ERROR.

We have heretofore filed a motion to dismiss or affirm and supporting brief in connection therewith, and deem it proper to file this Supplemental Argument in response to the brief of Plaintiff in Error recently filed herein.

This suit was instituted by Mary J. McGinnis as the administratrix of the estate of W. T. McGinnis, deceased, for the benefit of herself as the surviving wife of the said W. T. McGinnis and for the benefit also of her children, Lyle, Laland, and Lamar, and

also Nelta Saunders. Prior to his death the deceased was a locomotive engineer for the appellant, and his run was on a fast passenger train known as No. 17, between Cleburne, in Johnson County, Texas, and Bellville Yards, in Austin County, Texas. On the night of October 6, 1909, he ran into a defective switch at Silenus Station, about three miles southeast of Temple, in Bell County, Texas, while going at a high rate of speed, and received serious and fatal injuries from which he died on the same night. The light in the switch stand at the point in question was showing green, and indicated a clear main line track, and there was nothing to indicate any danger until after the train had struck the defective switch and was derailed.

The air and brakes were instantly applied by the deceased, as three of the coaches did not pass over the defective switch, the remaining cars were derailed, but were standing on their wheels, and the engine and tender had broken loose from the train and turned over, the tender being on the left hand side of the track, and the engine on the right hand side, having turned around with its front pointing back towards Temple.

The plaintiff alleged in her petition that the

train was caused to be derailed because of an unsafe track and roadbed, and because the defendant negligently permitted its track and switch at that point to be and remain in a dangerous condition and permitted its switch point to become worn, and broken off and defective, and because said defendant had negligently failed to inspect its track and switch and had negligently failed to repair and remedy the same, and had failed to provide any warning to the said W. T. McGinnis of the fatally dangerous condition thereof.

While this cause was prosecuted in the State Court, the same was instituted and tried under and in accordance with the Federal Employer's Liability Act, and resulted in a verdict and judgment in favor of the plaintiff, as administratrix, in the sum of fifteen thousand dollars ($15,000.00). On the trial the defendant in error based the cause of action solely upon the plaintiff in error's negligence in permitting its track and switch at the place of derailment to be and remain in a defective and dangerous condition and introduced abundant testimony to show that the railway company had permitted said switch to be in such condition for a long time, as evidenced by the worn condition of its switch points, the evidence

showing that rust had accumulated on the points which had worn away, and the testimony of numerous witnesses was offered in support of the contention. The plaintiff in error undertook to defend by offering some testimony to the effect that about dark on the night of the derailment an explosion had been heard in the neighborhood of this switch, or a report of some kind resembling the sound of an explosion, and also offered some testimony to show that there was some discoloration on the switch stand, as if powder or some other explosive had been used there. The defendant in error in rebuttal of this testimony proved by other witnesses that there was no such discoloration, and that the Pitman rod which connected the switch stand with the railway track was bent, indicating that the switch had not been displaced prior to the wreck, but that the great force of the train, after splitting the defective switch, had bent the Pitman rod, and produced the injury to the same, which was shown to have existed after the wreck. These issues were all submitted to the jury, and the jury found adversely to the contention of the plaintiff in error. The trial court sustained the verdict and judgment as being supported by the testimony, and the Court of Civil Appeals, in the opin-

ion rendered by it, made findings of fact sustaining the verdict of the jury. In the introduction of its testimony the plaintiff relied exclusively upon the testimony offered, showing the long continued existence of a defective switch and offered no testimony whatever as to any negligence of the plaintiff in error in failing to inspect its switch after dark on the night of the derailment. The plaintiff in error, having plead the defense of assumed risk, offered some testimony tending in some measure to prove outside interference and in connection with this defense the court made its instructions upon the issue of assumed risk.

Brief of Argument.

The verdict of the jury is amply supported by the evidence herein; the evidence of many witnesses establishes conclusively that the switch point at the place of derailment was worn away and defective and that the same was the cause of the train splitting the switch and causing the wreck. That when the train spilt the switch at the rate of sixty miles an hour, it did additional damage to the point farther back on the point than had previously worn away and crumbled off; that the great force of the train bent the Pitman rod, and drove the same from

its holding; that the switch was open only about an inch, the extent which the train would have opened it in splitting the switch was also a potent fact.

Walter S. McGregor was offered as a witness in the direct testimony for the defendant in error. He was a passenger on another train that came to the place of the wreck shortly after it occurred. He knew W. T. McGinnis in his lifetime, and testified that it was 2:10 in the morning when he reached Silenus and found that there had been a derailment of the southbound passenger train known as No. 17 of the Santa Fe. He stated that on the right hand side going southward the engine was lying, and the tender was on the left hand side looking southward; that a number of cars, including the baggage and mail cars, were derailed; that some of the Pullman cars and one of the chair cars had remained on the track; that the train was derailed at the switch; that the green light showed, so that a train approaching, as this one did, the engineer would see the green and not the red light; that this indicated that the switch was lined up for the main line and that the main line was safe for the train to pass on; that the brakes were set; that the train had broken in two; that all the coaches were standing on their wheels, and the

engine and tender were the only part that went into the ditch; that he saw McGinnis, the engineer of the train, lying on a blanket on the side of the track. (Record p. 39.)

It was admitted that the deceased, W. T. McGinnis, was injured and died from the result of the injuries sustained in that wreck. (Record p. 41.)

The witness J. H. Talley (Record p. 42) testified that he was constable at the time of the wreck at Silenus, and that the wreck occurred about three miles south of Temple, near his father's home; that the Santa Fe railroad has at Silenus six switches; that he heard of the wreck and Mr. McGinnis' death and went down to Silenus from Temple early on the morning that the same happened; and after testifying to many other facts pertinent to the issues involved, he stated that the switch was slightly open; that he could almost run his little finger between the point of the switch at that time, and the main line rail; that several cars were still standing there; that the condition of the switch point that fitted up against the rail was in a worn and crumbled condition; that this condition made it a defective switch; that this condition made it so an engine would be quicker to take hold of it than if the point had been a good one;

that the switch point fitting on the main line rail should fit up on the inside of the rail closely, and if it is a sharp point and fits closely the wheel will go onto the main line. He testified that the condition there indicated to him that the engine had split the switch and that the engine went through the switch, and stated that what he meant by a split switch was that the train had gone through the switch without the switch having been thrown open, and he stated that the effect of a train splitting the switch, if the bridle rod and the switch were all properly connected, would be to break the bridle rod or bend the same. The witness testified that he had been in the railway service; that he had worked as a trainman, and that he had seen many split switches and stated that if the switch had been in good condition that a train could not split it, and that there was more danger in passing over switches than other parts of the track on account of the dangers incident to defective points. He said that it looked to him like the engine had split the switch, and that if the switch had not been defective, it would not have been any more likely to have derailed at that point than at any other. He said that a train could not split a switch unless it was partly open, or defective; that it would be impossi-

ble. He further testified that the defective condition in that point seemed to be old on the first part of the point, and that if the bridle rod had been loosened prior to the wreck so as to have partly thrown the switch, there would have been nothing to prevent the bridle rod from moving back and forth without obstruction, and that there would have been nothing to have bent the bridle rod. The witness, on being recalled, (Record p. 16) stated that it was his opinion that the cause of the wreck was that the engine split the switch, and that he thought the defective switch point caused it to split the switch.

The witness E. F. Gresham was introduced by defendant in error (Record p. 49) and testified that he resided in Fort Worth, Texas, and was a railway mail clerk on the train at the time of the wreck at Silenus. That he knew the engineer, W. T. McGinnis, who took charge of the train at Cleburne, and who was on the engine operating the same at the time of the derailment; that the usual and customary rate of speed in making the regular time for that train is about fifty or sixty miles per hour; that they were running about sixty miles per hour at the time of the wreck; that as the train approached Silenus on that night he saw the green light was burning,

which indicated that the track was clear; that the red light would have indicated danger, or that the switch was turned, but that the green light was burning; that the first intimation he had of any danger was after the train struck the switch and its sudden stopping; that the train began to slow very rapidly, making a very sudden stop; that he saw Mr. McGinnis, and that he examined the switch points; that the point was crumbled and that it looked like a part of it was gone; that the switch was slightly open.

The witness J. E. Newman testified in behalf of the defendant in error (Record p. 53); and testified that he lived in Temple, and that in 1909, at the time of the Silenus wreck he was in the employ of the Santa Fe Railway Company; that he knew W. T. McGinnis in his lifetime, and remembered the circumstances of the wreck in which he was killed; that he went from Temple down to Silenus about 7 o'clock the next morning after the wreck, and that he noticed the switch when he got there; that he noticed the point fitting up against the right hand rail, and that it was about three-quarters of an inch from the rail, open to that extent; that it was crumbled off for about twelve inches from the point that goes to the main line rail; that it was crumbled about twelve

inches up against the point that closes up against the rail, that closes on the left hand side of the same. Near the point, the wearing away appeared to be old; that it had the appearance of having gradually worn through; that he had noticed lots of switch points, and had noticed the gradual wearing and crumbling away; that he saw this switch point and that where it was rusted off, it was sharp and crumbled off, and that after it got up about ten inches there appeared to have been some new bits or particles broken off, as if some new break where the flange had struck it; that it had broken off and dropped down between the main line and the switch; that those twelve inches on the switch flange being worn away left room for the flange on the engine wheel to run between the switch point and the main line rail, causing the flange of the tender wheel to catch on the point and between the point and the main line and cause the wheel to leave the main line rail; that Mr. Hardy and George Coleman went down there with him.

The witness W. N. Thurman (Record p. 54) testified for the defendant in error and stated that he was a farmer and resided near Temple; that he went down to the scene of the wreck at Silenus the next

morning after it occurred; that the switch point seemed to be slightly open, and the point was defective; that the condition of the switch point indicated that it was not a new defect; that the same did not look fresh; that it had not recently been done; that while he could not tell from looking at it how long it had been wearing or crumbling off, that he did not see any fresh signs of injury to the switch point.

The witness J. W. Hardy testified also for the plaintiff in error (Record p. 55) and stated that he lived in Temple; that he was a farmer; that he was working for the Santa Fe Railway Company in October, 1909, at the time of the wreck at Silenus; that he went down there about seven o'clock on the morning it occurred; that the switch was slightly open; that the point of the switch was crumbled off for about ten or twelve inches; that there was a part of this crumbling and wearing away which appeared to be old; that at the switch point where the defect started the injury to the point appeared to be old; that farther back on the point there was some new and additional injury to the same; that the wearing away of the switch point looked like it had been

gradually done; that he could tell it was an old crumbling because it was rusty.

From the foreoing it is noted that the defendant in error based her right to recover upon the negligence of the plaintiff in error in permitting its switch point to be and remain in a defective condition, and the court properly gave to the jury paragrah six of the charge, which is quoted on page 14 of the plaintiff in error's brief. After the introduction of the foregoing testimony, and after the defendant in error had closed her case, the plaintiff in error introduced its evidence and undertook to show outside interference with its switch and track on the night of the wreck, and in connection with this testimony contended that the deceased assumed the risk of the failure to inspect at night, and requested certain charges of the court on that issue, which were given, and among the charges given were the following:

"If you believe that the deceased knew that it was not usual or customary to have the switch stands, switches and track inspected under normal circumstances in the night time, then you are charged that deceased assumed all the risk growing out of such failure to inspect, and plaintiff cannot

recover because of the failure of the railroad company to so inspect"; also the following:

"You are charged that the employe assumes all the risks ordinarily incident to the business in which he is engaged, and if you find that the death of W. T. McGinnis was caused by one of the risks ordinarily incident to the running of locomotive engines, and was not the result of any want of ordinary care on the part of the defendant in providing and maintaining reasonably safe tracks and switches for the running of its trains, then if you so find, you will find for the defendant." Also the following:

"You are charged that the railway company is in no case the insurer of the safety of its employes, and if you find from the evidence that at th epoint of the accident the defendant company provided and maintained reasonably safe tracks and switches, for the purpose of conducting its business in operating its freight and passenger trains, and that the accident was solely the result of an injury to the switch caused by some evil minded person, and not through the want of any ordinary care on the part of the defendant, then if you so find, you will find for the defendant." (Record, pp. 17 to 20.)

Also Special Charge No. 5:

"You are charged that if you believe from the evidence that it was not usual or customary to inspect the switches or track in the night time, and that there was no circumstance known to the defendant in the exercise of ordinary care to indicate that the switch and track at the place of the accident should be inspected, then you are charged that the defendant would not be guilty of negligence for its failure to so inspect." (Record pp. 16 to 20.)

The main question raised in this record was as to the failure of the defendant to perform its duty relative to this track, for a long period of time prior to the day of the accident, and not as contended by the plaintiff in error on page 18 of its brief, that our main contention was as to the failure of the railroad company to inspect during the eight hours prior to the derailment. Defendant in error was entitled to the charge given by the court, as contained in paragraph six, relative to the plaintiff in error permitting its switch to become defective and failing to inspect. And there being a conflict in the evidence as to whether there had been outside interference, the plaintiff in error was only entitled to have its charges on the issue of assumed risk submitted to

the jury in connection with the defense offered by it as to such outside interference, and in no event could the court have held as a matter of law that the deceased assumed the risk and that the plaintiff was not liable for his death. We have in the supporting brief, made a part of our motion to dismiss or affirm heretofore filed in this cause, presented our views, contending that no issue of assumed risk was presented by the pleadings and proof offered in this case, and we again call the court's special attention to the same, which may be found in our motion to affirm (pages 57-63.) We do not believe that the deceased assumed even any risk growing out of plaintiff in error's failure to inspect on the night of the derailment. It was not contended that the deceased had any knowledge of the defective condition of the switch. The deceased was not connected with the work of inspecting switches, therefore he did not assume the risk of injury from the negligent method by which the plaintiff in error did its inspecting. However, the trial court took the opposite view and gave the plaintiff in error the full benefit of charges presenting the issue of assumed risk on every possible phase of the case as presented by its pleadings, and by its special charges requested.

The Court of Civil Appeals of the Third Supreme Judicial District of the State of Texas, in deciding the case, passed upon the sufficiency of the evidence to sustain the verdict, and upon the issues of fact as presented by the testimony, and declined to disturb the verdict, and declined to hold as a matter of law that the plaintiff in error has established the facts called up by it in support of its plea of assumed risk. On the contrary, the Court of Civil Appeals in its opinion has found that W. T. McGinnis was the engineer in charge of plaintiff in error's southbound passenger train out of Temple on the night of October 6, 1909, which was derailed at Silenus about 2 o'clock on the morning of the 6th. The court also found that the train was making some sixty miles an hour at the time of the accident, and that the switch light was set so as to indicate a clear main line track, but the switch was partly open and its point worn and defective, on account of which, in railroad parlance, the train "split the switch," causing the wreck. The Court of Civil Appeals in its opinion makes the following findings:

After referring to the defense plead by plaintiff in error, and the testimony offered by it with reference to the explosion, the opinion contains the fol-

lowing language: "Controverting this theory there was evidence on the part of plaintiff by persons who had also examined the switch and stand immediately after the accident to the effect that there was no such discoloration as claimed by witnesses for defendant, and further, that the Pitman or bridle rod was bent, which indicated that it was occasioned by the force of the wreck, rather than the cause of it, and that it would not likely have been bent if it had been misplaced prior to the wreck." (Record p 121.)

Also, "It was further shown on the part of plaintiff by several persons who examined the switch that it was slightly open, estimated to be from three-fourths to one-half an inch, and that the switch points appeared to have been gradually worn off for some ten or twelve inches back; that this wearing away seemed to be old as evidenced by the rust thereon, and that such condition would occasion a wreck by causing the engine to split the switch." (Record p. 122.)

Also, "Appellee contends that this charge (referring to paragraph 6) is not subject to the criticism offered that the jury were not authorized to find a verdict against the defendant merely because the switch was defective, unless they further found

that defendant failed to inspect, and was guilty of negligence and that the same was the direct and proximate cause of the death of deceased, contending that the evidence established that the switch had been defective for a long time, as was apparent from the condition of the switch points.

"We think appellee is correct in this respect. The charge does not authorize a recovery on the ground that the jury should merely find that there was a defective switch, unless they further found that the defendant had failed to inspect and was guilty of negligence in so failing, and that this was the proximate cause of the injury. It is true that the burden of proof rested upon the appellees to show negligence before they were entitled to recover, but in the instant case it will be recalled that the proof did show a derailment, and that the same was occasioned by a defective switch."

Also the following, "The remaining assignments in many respects assail the evidence as being insufficient to sustain the verdict. We have carefully considered the entire record in connection with these several assignments, and while there is some evidence tending to show that the switch had been interfered with and that some care had been exer-

cised for the protection of the track, still as there was a conflict as to both of these issues we are not inclined to disturb the judgment on this ground, since under appropriate instructions the jury have passed upon these issues, and the trial court, who was in better position than we are to determine the truth or falsity of the evidence to sustain or defeat the respective contentions, had declined to interfere therewith."

From an inspection of the record it may be seen that the plaintiff in error did not offer any testimony to show that any person for it had ever made an inspection of its switch stands and switch points, and the only character of evidence it did offer in this respect was the fact that other engines had passed over the track at that point without derailment, but no person for it was shown to have made such an inspection and examination of the switch points as would have discovered the defective condition shown to have existed by witnesses for defendant in error. It offered testimony that it had in its employ at the time certain section men whose duty it was to inspect the track daily, but they were not offered as witnesses to show that they had performed that duty. One member of the fence gang, J. S. Snyder,

was called as a witness, but he stated that he did not know what the condition of the switch was, further than that the hand car he was riding on went over the same in safety on the afternoon of the wreck. Neither his foreman nor any of the other employes working with him were produced as witnesses.

It is true one witness, J. C. Curran, road master for plaintiff in error between Temple and Somerville, did testify that he examined this particular switch the evening before the wreck, and found it in A One condition. He stated that the switch points at that time were in perfect condition, but as he testified that he was riding on a passenger train at the time, making forty miles an hour, the jury were justified in not attaching much importance to his evidence. (Record p. 90.)

The testimony of many witnesses conclusively establishes the cause of the wreck to have been the defective condition of the switch points, which defective condition had existed for a long time, as the rust had accumulated on the old points, which had worn away and crumbled off. Every train would not split the switch, but it was rendered dangerous, and proper inspection would have discovered the defect, and ordinary care would have remedied it. It

does seem under these circumstances plaintiff in error would have shown what inspections, if any, it had made of its track at this point, or have in some way accounted for its failure to inspect if it could have done so. The plaintiff in error, instead of doing this, undertook to show that some evilly disposed person about night on the evening before the wreck had interfered with the switch. But it offered no direct or positive evidence of such interference, and defendant in error offered evidence to establish the contrary, and on the evidence offered the jury determined the question adversely to plaintiff in error, and its findings should be final.

Taking all of the court's charges together, the jury could not have found for the defendant in error if it had found that the track and switch had been tampered with on the evening before the wreck, so the jury must necessarily have found against plaintiff in error as to any outside interference having been made with its track or switch.

The plaintiff in error made its application for a Writ of Error herein to this Court upon the ground that there was drawn in question the validity of a Statute of the State of Texas, under the facts of this case, on the ground of its being repugnant to the

laws of the United States on the same question, and that the decision was in favor of such, the validity of said statute as same applied to the facts of this case, the same being known as chapter 163, Twenty-ninth Legislature of the State of Texas, and also stating in its application that there was drawn in question herein a right, privilege and immunity claimed under a Statute of the United States, the same being the Federal Employers' Liability Act, and it was evidently upon these representations that the Writ of Error was granted herein. The plaintiff in error, on page 19 of its brief filed herein, now admits that it was not contended that there was a violation of the plaintiff in error of any statute enacted for the safety of the employes which contributed to the action in question. Neither did plaintiff in error claim any privilege or immunity under any statute of the United States which was denied it. So it seems apparent to us from the record that the grounds for such writ of error, as alleged by plaintiff in error in its application do not exist, and that no jurisdiction of this Court is shown. We do not understand that this Court will review questions of fact which have been passed upon by the jury and by other courts.

The Apportionment of Damages.

Under the Federal Employers' Liability Act it is provided that cause of action thereunder shall be brought by the personal representative for the benefit of the surviving wife and children of the deceased. Judgment in such case is properly rendered for the personal representative, and no apportionment is required. The instruction of the court to apportion in such case is not necessary, and the apportionment being unnecessary and not required, is surplusage, and the same is harmless.

In Railway Company vs. Mary Agnes Walsh, administratrix, the same being one of the Employers' Liability cases, decided by this Court at its late term, judgment was affirmed wherein the recovery was for Mrs. Agnes Walsh, as administratrix, and without any apportionment.

The judgment rendered in this case was for Mary J. McGinnis as administratrix. The verdict of the jury was in favor of Mary J. McGinnis, as administratrix of the estate of W. T. McGinnis, deceased. No judgment was rendered for any other person, but in addition to the recovery, for administratrix, an apportionment was made determining the amount which each person should receive for

whose benefit the suit had been brought. This apportionment could in no way injure or affect plaintiff in error or any right contended for by it. No right, privilege or immunity claimed under any law of the United States was denied, the same was entirely harmless, at least as to plaintiff in error.

Mrs. Nelta Saunders was the daughter of W. T. McGinnis, and as such she had the right to expect contributions from her father during his lifetime, and upon his death, as his heir, she would have shared equally with the other children in the distribution of his property and all his savings. Plaintiff in error cannot complain that the jury in apportioning the recovery set apart a small portion of the same for her. The apportionment made by the jury was the same as would have been made by the laws of the State of Texas, as one-half of the recovery was awarded to the surviving wife, and the remainder was divided equally among the children. This is in direct accord with the statutes of the State of Texas on the laws of Descent and Distribution, and if no apportionment had been made by the jury or by the court in this cause, the administratrix must have accounted to the estate for the entire recovery of fifteen thousand dollars ($15,000.00) and

under the laws of the State of Texas Mrs. Nelta Saunders would have received the exact amount which the jury awarded her; however, if no apportionment were necessary, and if it were not proper to make such apportionment as is made of this estate, under the laws of Descent and Distribution, at least plaintiff in error had no right to complain, and if such right does exist it would be at the instance only of the persons for whose benefit this suit was brought.

Conclusion.

From the foregoing we insist that the motion to dismiss shall be granted. The validity of no statute, either state or federal, is drawn in question; neither the state nor federal acts relating to assumed risk were invoked by defendant. We do not understand that a right to Writ of Error to this Court exists merely because the suit was prosecuted under a federal act. No right, privilege or immunity claimed under the constitution or any statute of the United States was denied to the plaintiff in error.

This cause was tried under the common law relative to assumed risk, and we think the issue of assumed risk was presented more favorably to the plaintiff in error than it was entitled to, the same

being presented in charges requested by the plaintiff in error, while in our opinion the issue of assumed risk was not in the case. We respectfully submit that from the record it is obvious the motion to dismiss should be granted, because it is apparent that the grounds for the writ as alleged in plaintiff in error's application do not exist. We therefore pray that the writ be dismissed and that defendant in error be allowed costs and the penalty of ten per cent of the judgment of the court because of the unnecessary delay occasioned herein. In the event defendant in error is not entitled to the dismissal of the writ, then we ask that this cause be affirmed, and in this event we also pray for such damages and costs, as it is apparent the writ of error was sued out for delay only.

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